TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL.,
APPELLANTS,

vs.

EMMA SHANNON, ET AL., ETC.

No. 421

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, APPELLANTS,

vs.

EMMA SHANNON, ET AL., ETC.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

NO. 406 FILED AUGUST 26, 1963
NO. 421 FILED AUGUST 30, 1963
PROBABLE JURISDICTION NOTED NOVEMBER 12, 1963

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 10, 1964

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON
d/b/a E. and R. SHANNON

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

COMPLAINT—Filed May 25, 1960

To the Honorable Judge of Said Court:

Now come Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, both of whom reside in San Antonio, Bexar County, Texas, hereinafter called plaintiff and present this complaint against United States of America and Interstate Commerce Commission, and for such complaint respectfully state:

1.

That E. and R. Shannon was a partnership with E. Shannon being dead prior to November 5, 1956, the date upon which the Bureau of Inquiry and Compliance of the Interstate Commerce Commission instituted, on its own initiative under the appropriate section of the Interstate Commerce Act (U.S. Code, Title 49, Sec. 304 (c)) an investigation of the operations of such above named entity, the final order of said Interstate Commerce Commission concerning such investigation, being the subject matter of this action and the order of which plaintiff seeks to enjoin the enforcement, such matter being numbered before such Interstate Com-

merce Commission as MC-C-2055. For some reason such cause was decided together with cause number MC-C-1994 styled *Fraering Brokerage Company, Inc., Investigation of Operations,* but such matters were not heard together nor [fol. 2] connected in any way except possibly that the decision of both cases together was more convenient for the Interstate Commerce Commission. That Emma Shannon inherited part of the interest of her deceased husband, E. Shannon in such business above described, but never took any active interest in such business and was in fact a woman of approximately 80 years of age at the time of the institution of the above referred to investigation. That subsequent to the institution of such investigation Emma Shannon sold all her interest in such business to Richard Shannon, her son, who now still continues to do business under the above described firm name. That J. T. Wilcox, doing business as Wilcox Brokerage Company, was originally a party to this matter in the investigation of operations before the Interstate Commerce Commission; however, the order of the Interstate Commerce Commission dismissed him from such cause.

2.

The Interstate Commerce Commission is a Commission created and established by Section 11 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 11) as amended and having the jurisdiction and authority conferred by the terms of said Act.

3.

Plaintiff brings this action against the United States of America pursuant to the United States Code, Title 28, Sections 1336, 1398, 2284, and 2321-2325 to enjoin, set aside and annul a certain report and order entered by the Interstate Commerce Commission on April 5, 1960, but not delivered to plaintiff until the week of April 18, 1960, such order setting the compliance date as May 23, 1960, and being entered in the above numbered and described cause; i.e., MC-C-2055 before such Interstate Commerce Commission, and for further relief as hereinafter prayed.

[fol. 3] 4.

That on March 29, 1957, a hearing was held in the above numbered matter before R. J. Mittelbronn, Hearing Examiner, in which a full stenographic report was made, and on August 29, 1957, said examiner served his recommended report and order upon the parties, same being hereto attached and marked Exhibit "A" and made a part hereof as fully as though set forth at length herein, such report and order recommending that the action against plaintiff be dismissed. That almost two years later, to wit, August 3, 1959, Division 1 of the Interstate Commerce Commission decided this matter, and served copies of such report and order on plaintiff on August 11, 1959, same being hereto attached and marked Exhibit "B" and made a part hereof as fully as though set forth at length herein, such report and order requiring plaintiff to cease and desist from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained. That such report and order failing to follow the recommended report and order (Exhibit "A") was made only after the Interstate Commerce Act was amended, as described in said Exhibit "B", but plaintiff contends that such amendment of such Act should not affect plaintiff and that the recommended report above described as Exhibit "A" should have been adopted by said division of such Interstate Commerce Commission. That plaintiff filed in due time a petition for reconsideration before the Interstate Commerce Commission as a whole; however, as described above in paragraph 3, said Interstate Commerce Commission on April 5, 1960, issued a summary order without opinion stating that the findings of Division 1 were in accordance with the evidence and the applicable law and ordering the order of August 3, 1959, above described, as [fol. 4] indefinitely postponed with respect to statutory effective and compliance date be reinstated and the statutory effective and compliance date was thereby fixed as May 23, 1960, such order being marked Exhibit "C" and made a part hereof as fully as though set forth at length herein.

That the aforesaid order and report above described as Exhibit "C" as supported by the report thereof in Exhibit "B" are unlawful and void in the following respects:

1. There was no evidence upon which the Interstate Commerce Commission could make its final report and order and more particularly, but not limited to the key finding in such report that plaintiff has been and are engaging in transportation, in interstate commerce of sugar from Supreme, La. to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206 (a) or 209 (a) of the Interstate Commerce Act.

2. That the key finding in such report that plaintiff has been and are engaging in transportation, in interstate commerce of sugar from Supreme, La. to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206 (a) or 209 (a) is

a. insufficient in fact or evidence

b. not supported by fact or evidence

c. insufficient in fact or evidence to the extent that the action by the Interstate Commerce Commission in finding otherwise was either illegal or arbitrary or capricious or a combination of same.

3. The Interstate Commerce Commission by its order above referred to as Exhibits "B" and "C" exceeded its authority and acted arbitrarily, illegally and/or capriciously.

4. That in view of the evidence in this matter, as a matter of law plaintiff should be declared to be engaged in [fol. 5] private carriage in respect to its transactions in sugar so that the above described order and report of the Interstate Commerce Commission should be set aside and enjoined.

5. That if the amendment of the Interstate Commerce Act in August, 1958, (after the taking of evidence in this cause) as set out on page 11, Exhibit "B", which amend-

ment amended section 203 (c) of such Act, had the effect of changing the legal effect of the operations of plaintiff under such Act, that plaintiff in carrying on such operations legally and properly prior to the amendment of such Act should be permitted to continue to do so inasmuch as plaintiff was lawfully engaged in same long prior to such amendment and to permit the amendment of such Act to make plaintiff's actions illegal under the facts of this matter would be arbitrary and/or capricious.

6. That the Interstate Commerce Commission acted arbitrarily, capriciously, and/or illegally in finding that under the facts and evidence before it, that under the "primary business" doctrine the transportation in question by plaintiff did not constitute private carriage.

7. That there is insufficient evidence in the record to show some rational basis for the administrative conclusions reached by the Interstate Commerce Commission in making the report and order above described as Exhibits "B" and "C".

6.

That the undisputed evidence has shown in this cause that plaintiff is in the business of buying and selling sugar as well as livestock, corn, oats, wheat, bran, molasses, fertilizer, and salt and has been for some time. That the Interstate Commerce Commission does not contest the private carriage of any of the items except sugar and to find that plaintiff's operations in sugar is not private carriage is [fol. 6] arbitrary or capricious and contrary to the undisputed facts and law in view of the fact that plaintiff buys the sugar, is responsible for same, transports same in his own trucks, which trucks are only a part of the total assets of the company, sells the sugar on credit, and keeps a reasonable inventory of sugar on hand.

7.

Plaintiff demands that defendant, Interstate Commerce Commission produce the following originals of such instruments in their possession; otherwise plaintiff will request permission to introduce secondary evidence thereof:

1. Stenographers' Minutes in Docket No. MC-C-2055 before the Interstate Commerce Commission being in the Matter of *Emma Shannon and Richard J. Shannon*, DBA *E. and R. Shannon* and *J. T. Wilcox*, DBA *Wilcox Brokerage Company—Investigation of Operations*, at San Antonio, Texas, March 29, 1957.

2. Report and Order recommended by R. J. Mittelbronn, Hearing Examiner, served August 29, 1957, in such cause.

3. Report of the Commission, Division 1, in such cause dated August 3, 1959, and served August 11, 1959.

4. Final Order of the Interstate Commerce Commission in such cause dated April 5, 1960, effective May 23, 1960.

5. Brief of Respondents due date May 29, 1957.

6. Respondents' Reply to Exceptions of Bureau of Inquiry and Compliance to Examiner's Recommended Report and Order due date November 8, 1957.

7. Petition of Emma Shannon and Richard J. Shannon dba E. and R. Shannon for Reconsideration due date September 10, 1959.

8.

Plaintiff would further unto the Court that immediate and irreparable injury loss and damage would result to plaintiff unless a temporary restraining order or stay order be issued ex parte and without notice against said defendants as provided for in United States Code, Title 28, Section 2324, restraining the Interstate Commerce Commission and the United States of America pending the final hearing and determination of this action from enforcing the terms of said order of April 5, 1960, hereinabove described as Exhibit "C", in that plaintiff has been actively engaged [fol. 7] in the sugar business for approximately six years and has established customers who purchase such sugar from plaintiff and for plaintiff to cease and desist from purchasing same from Supreme, La., plaintiff's chief source of sugar for transportation to San Antonio, Texas, for

sale for any period of time would cause plaintiff's inventory of sugar and sources of sugar to be seriously depleted and would cause plaintiff's customers to go elsewhere for their sugar and thereby cause plaintiff to lose all or a substantial portion of their customers, thereby greatly damaging plaintiff and causing plaintiff immediate and irreparable injury.

Wherefore, plaintiff prays that a three-judge court be convened, pursuant to United States Code, Title 28, Sections 2284 and 2325, upon the filing of this complaint; that plaintiff be granted an interlocutory injunction or stay order as provided in United States Code, Title 28, Section 2324, restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order of April 5, 1960, and above described as Exhibit "C", which required and requires respondents (plaintiff herein) to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report (Exhibit "B") to be unlawful, unless and until appropriate authority therefor is obtained; and that upon the final hearing of this cause, a decree be entered adjudging the said order to be in all respects null and void and permanently enjoining, annulling and setting aside the enforcement, operation and execution of said order; and for such further and other relief in the premises as to this court shall seem proper.

Wolff & Wolff, By Walter C. Wolff, Jr., Attorneys for Plaintiff, James K. Building, 417 S. Main Avenue, San Antonio, Texas;

[fol. 8] E. and R. Shannon, By Richard J. Shannon.

Duly sworn to by Richard J. Shannon, jurat omitted in printing.

[fol. 9] FIAT

Upon the verified complaint heretofore filed herein and upon motion by plaintiff for an interlocutory injunction and for a temporary restraining order without notice against the defendants, it appearing to this court that the complaint seeks a judgment restraining the United States of America and the Interstate Commerce Commission from enforcing the terms of said order of April 5, 1960, which required and requires plaintiff herein to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report (Exhibit "B") to be unlawful, unless and until appropriate authority therefor is obtained, this court finds that immediate and irreparable damage will be caused to said plaintiff unless a temporary restraining order is issued ex parte and without notice against said defendants, in that from the evidence in such verified petition before the court it appears that plaintiff has been actively engaged in the sugar business for approximately six years and has established customers who purchase such sugar from plaintiff and for plaintiff to cease and desist from purchasing same from Supreme, La., plaintiff's chief source of sugar for transportation to San Antonio, Texas, for sale, for the period of time necessary to notify defendants and have a hearing thereon would irreparably damage plaintiff in that plaintiff's inventory of sugar and sources of sugar would be seriously depleted causing plaintiff's customers to purchase their sugar elsewhere,

Now, Therefore, It Is Ordered, Adjudged and Decreed that said United States of America and the Interstate Commerce Commission be enjoined from enforcing the terms of their order of April 5, 1960, which required and [fol. 10] requires plaintiff herein Emma Shannon and Richard J. Shannon, d/b/a E. and R. Shannon, cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally, from all operations in interstate or foreign commerce of the character found in the said division report of Division 1 of the Interstate Commerce Commission (Exhibit "B" herein) to be unlawful,

unless and until appropriate authority therefor is obtained until the final hearing and determination of this action by the full court of three judges.

This temporary restraint is on condition that a bond be filed by the plaintiff herein in the sum of ..... Dollars conditioned that plaintiff will pay all costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Issued at San Antonio, Texas, at ..... o'clock, ...M. this ....., ... day of May, 1960.

....., District Judge.

[fol. 11]

EXHIBIT A TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served Aug 29 1957

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON, dba E. AND R. SHANNON AND J. T. WILCOX, dba WILCOX BROKERAGE COMPANY INVESTIGATION OF OPERATIONS

Decided .....

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1. Investigation of J. T. Wilcox, doing business as Wilcox Brokerage Company dismissed.

2. Operations of E. and R. Shannon found not shown to be those of a common or contract carrier by motor vehicle subject to part II of the Interstate Commerce Act. Investigations discontinued.

Walter C. Wolff, for respondents.

William W. Guild, for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT AND ORDER

RECOMMENDED BY R. J. MITTELBRONN, HEARING EXAMINER

By order dated November 5, 1956, the Commission, division 1, instituted this investigation under section 204(c) of the Interstate Commerce Act for the purpose of determining (1) whether Emma Shannon and Richard S. Shannon, doing business as E. and R. Shannon, have been and are engaging in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209 (a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaging in transactions as a broker in violation of section 211 of the act. By subsequent order dated February 12, 1957, the Commission referred these matters to joint board No. 32 for hearing scheduled March 29, 1957. Said board having waived action thereon [fol. 12] by failure of its members to appear and participate in the assigned hearing, this report and accompanying

recommended order have been prepared by the examiner who conducted the hearing pursuant to said order of February 12, 1957.

During the course of the hearing no evidence was presented with respect to the implied unauthorized brokerage of transportation by respondent J. T. Wilcox. This phase of the investigation should therefore be dismissed. The facts pertaining to the nature of respondent E. and R. Shannon's business interests are not in dispute; it is only the significance to be attributed thereto that gives rise to the controversy herein. Said undisputed facts can be summarized thus: E. and R. Shannon is a partnership which has been and still is engaged in the business of buying and selling livestock since 1934 (R-73).[1] The investigator for the Commission's Bureau of Inquiry and Compliance is satisfied in his own mind that the general and primary business of this partnership is that of a livestock dealer and shipper as well as livestock feedstuffs dealer (R-27). Respondent was certified years ago by the Interstate Commerce Commission as a private carrier of livestock and is so registered at this time (R-28). About 1951 respondent's activities were expanded to include dealer handling of grain, fertilizer, molasses and salt; about three years ago respondent started in the purchasing and selling of sugar (R-74). The total fixed assets of respondent as of December 31, 1956 are:

Automobiles (3)	$ 4,597.01
Trucks (7)	14,176.50
Furniture & Fixtures	926.70
Total Mill Equipment (for grinding feeds etc.)	10,851.06
Building (principally storage)	26,944.49
Cottage[2]	1,854.50
Total	$59,450.26

[1] This has reference to the page number in the transcript of record.

[2] Cottage accepted in payment of bad debt.

As a dealer in livestock and feedstuffs respondent alternately employs one of three of its trucks to transport said commodities from San Antonio, Tex., to customers in or in the vicinity of Supreme, La. As a dealer in sugar, respondent purchases quantities of said commodity from a refinery by name of J. Aaron & Co., located in Supreme, La., the sugar is transported in respondent's vehicles returning to San Antonio, and there sold and distributed to local customers. The sales by J. Aaron & Co., to respondent are effected through J. T. Wilcox, broker in San Antonio, who receives a commission thereon from the refinery. All such sales are on credit with the usual 2 percent discount-10 days payment provision being honored; the sales by respondent to local customers are on the same basis. Based on the going market, the normal return to a sugar dealer in San Antonio averages anywhere from 25 cents to 35 cents per 100 pounds (R-69). While respondent has never employed regulated carriers to transport its movements of sugar from Louisiana to Texas it has and still does employ rail service to move some inbound and outbound carload movements of livestock, grains and other articles (R-86/87). Respondent admits it could not send empty trucks up to [fol. 13] Supreme, La., to haul sugar back and still make a profit on the sale of the sugar at current market prices in San Antonio (R-82). Prior to respondents dealings in sugar it back hauled salt and grain from Louisiana. (R-83).

Based on the foregoing described operations or respondent counsel for the Bureau of Inquiry adopts the position that respondent's transportation of sugar in its private trucks is not incidental to and in furtherance of its enterprise of selling sugar, but is for the purpose of profitting from the interstate transportation itself, which fact takes respondent out of the category of a private carrier as defined by section 203 of the act, citing, *Brooks Transportation Company, Inc.* v. *United States*, 93 F. Supp. 517, affirmed 340 U. S. 925, and other authorities. Heavy emphasis is placed on the following matters of record by Bureau Counsel to support its position: (1) The investigation by the local I.C.C. supervisor of respondent's record disclosed that the latter does not *customarily* store its

sugar, but has it delivered direct to purchasers; it is then argued that the purchase and transportation of sugar in the fulfillment of preexisting orders are indicia of a motor carrier operation. (2) Respondent's admitted inability to profitably engage in the sugar enterprise except by transportation of the commodity as a back-haul in its own vehicles is inconsistent with respondent's claimed status as a private carrier. (3) With total fixed assets of $59,350.26, respondent only employs the back-haul use of three trucks and the services of its drivers to conduct the activities in the sugar business; the total respondent weekly payroll is $1,100 which about $240 is paid these three drivers. From this Bureau Counsel argues that the record does not support a conclusion that respondent's facilities and payroll, insofar as they are directed to the sugar business, are presently expended on nontransportation functions. As a corollary, it is further argued that respondents activities in sugar dealing are possible solely through the use of its transportation facilities and personnel. This argument is buttressed with a showing that respondent's purchase, transportation and sale of sugar results in an average profit of 35 cents per 100 pounds, which is compared with the existing carload rail rate of 69 cents and the truckload common carrier rate of 109 cents from Supreme to San Antonio. (Exhibits Nos. 1, 2, and 3). From these facts Bureau Counsel concludes that if any type of common carriage were employed to haul the sugar, respondent's losses would be insurmountable; that the profit which is realized results only from the interstate transportation in its own trucks. Insofar as respondent's dealings in the sugar business are concerned, it is alleged that under the "primary business doctrine" enunciated by the Commission (Refer list of authorities, Bureau Counsel's Brief, page 8) respondent cannot be found to be a "private carrier" as defined in section 203 of the act.

A complete analysis of the definitions of "Common Carrier" "contract carrier" and "private carrier" as contained in section 203 of the act and the characteristics which distinguish private carriage from "for-hire" carriage, has been made by the Commission in *Woitishek Common Carrier*

Application 42 M.C.C. 193 and need not be repeated here. Sufficient it is to observe that in said decision the Commis-
[fol. 14] sion concluded "We are convinced that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business. In so doing, we shall, of course, give appropriate consideration to the fact, when shown, that an operator receives compensation for transportation performed identifiable as such, but we do not think that such fact alone should be allowed to control our decision. Neither does it follow that an operator having a bona fide business other than transportation may not also be carrier for-hire if it appears that any transportation which he performs is not primarily in furtherance of his noncarrier interest but rather is performed with a purpose to profit from the transportation as such. In short, each case must be determined upon its own particular facts, and neither the receipt of compensation for transportation identifiable as such nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive."

On the record as made the following facts appear to be significant: Respondent has been in business since 1934, almost 23 years, and in this protracted period it has not engaged in any important truck operations. Respondent has a storage facility at one point, San Antonio, in which it maintains a small inventory of sugar, and which is predominantly utilized for other commodities. While customarily respondent's transportation of sugar may be direct from origin to local customers, many small sales, i.e., from one to twenty-five bags, are made out of the warehouse inventory. Of respondent's total fixed assets approximating $59,000 only the partial use of three trucks and driver services plus a indefinable percentage of warehouse facilities are employed to conduct its sugar dealings. There is no identifiable transportation charges made by respondent to the purchasers of the sugar. Respondent has no basis or formula for assessing transportation charges; its sales are governed solely by the market price of sugar in San Antonio. His margin of profit of 35 cents per 100 pounds over the total costs of his sugar business, including

transportation, is only about 5 percent above the sales price of J. Aaron & Co., refinery. All of respondent's sales are to customers in the State of Texas, the greatest majority being right in San Antonio. Respondent does not hold himself out to the general public to haul sugar for any compensation; nor is it conclusively shown that it transports sugar for compensation to specifically fill individual orders or under individual contracts or even verbal agreements.

The examiner finds that respondent is engaged in a bona fide business of buying and selling livestock, livestock feedstuffs, molasses, grain, salt and sugar; that transportation in its own vehicles of the sugar to which it holds title and its sale thereof is in the furtherance of its commercial dealership enterprise in San Antonio. All of respondent's purchases of sugar are made f.o.b. refinery, the unidentifiable cost of transporting sugar to Texas in its own equipment is borne by respondent. Under the "primary business doctrine" test, discussed *supra*, such transportation of sugar is private carriage.

[fol. 15] The examiner recommends that the attached order embracing the foregoing findings and discontinuing the proceeding be entered.

By R. J. Mittelbronn, Hearing Examiner.

(Signature) R. J. MITTELBRONN

[fol. 16]

Recommended by R. J. Mittelbronn,
Hearing Examiner.

(Signature) R. J. MITTELBRONN

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1957.

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON, dba E. AND R. SHANNON AND J. T. WILCOX, dba WILCOX BROKERAGE COMPANY INVESTIGATION OF OPERATIONS

It appearing, That the Commission, division 1, by order of November 5, 1956, entered upon an investigation into certain alleged unlawful operations of the above-named respondents.

It further appearing, That full investigation of the matters and things involved has been made, that the said proceeding upon due notice has been heard by the examiner, who has made and filed a report containing his findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the proceeding insofar as it pertains to the investigation of operations of J. T. Wilcox, dba Wilcox Brokerage Company, be, and is, hereby dismissed.

It is further ordered, That the investigation of other named respondents be discontinued.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 17]

EXHIBIT B TO COMPLAINT

Date of service August 11, 1959

INTERSTATE COMMERCE COMMISSION

No. MC–C–1994[1]

FRAERING BROKERAGE COMPANY, INC.,
INVESTIGATION OF OPERATIONS

Decided August 3, 1959

1. Operations by respondent, in No. MC–C–1994, in the transportation of sugar from Matthews, La., to Harlingen, Tex., found to be those of a carrier for hire for which authority is required. Order entered requiring respondent to cease and desist from such unauthorized operations.

2. Operations by respondents Emma Shannon and Richard J. Shannon, in No. MC–C–2055, in the transportation of sugar from Supreme, La., to points in Texas found to be those of a carrier for hire for which authority is required. Order entered requiring respondents, jointly and severally, to cease and desist from such unauthorized operations.

3. Respondent J. T. Wilcox found not shown to have engaged in transportation as a broker of transportation in violation of section 211 of the act. Order entered discontinuing proceeding No. MC–C–2055 as to this respondent.

[1] This report also embraces No. MC-C-2055, Emma Shannon et al., Investigation of Operations.

Robert A. Ainsworth, Jr., for respondent in the title proceeding.

Walter C. Wolff, Sr., and *Walter C. Wolff, Jr.*, for respondents in the subtitled proceeding.

Ellis V. Gregory, Bernard H. English, and *William W. Guild* for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB

BY DIVISION 1:

These proceedings were heard on separate records and were the subject of separate examiner reports and recommended orders. Since related issues are involved, they will be disposed of here in a single report.

Exceptions were filed by respondent in the title proceeding to the order recommended by the examiner, and the Bureau of Inquiry and Compliance of this Commission, hereinafter called the Bureau, replied. In the subtitled proceeding, the Bureau filed exceptions to the order recommended by the examiner, and respondents replied. Our conclusions differ somewhat from those recommended.

In No. MC–C–1994 by order entered June 21, 1956, division 1, instituted an investigation under section 204(c) of [fol. 18] the Interstate Commerce Act, to determine whether Fraering Brokerage Company, Inc., hereinafter called Fraering, of New Orleans, La., has been or is engaging in the transportation of property, in interstate or foreign commerce, for compensation, as either a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act. After hearing, the examiner found that Fraering's transportation of sugar from Matthews, La., to points in Florida, Mississippi, and Texas is that of a for-hire carrier by motor vehicle subject to part II of the act, and recommended that it be ordered to cease and desist from such operations.

On exceptions Fraering contends that the examiner erred (1) in finding that it was interested solely in the revenue

earned by its trucks transporting sugar in order to obtain a return movement of canned goods, (2) in finding that its principal consideration in transporting sugar sold is the revenue received from the transportation thereof, and (3) in finding that transportation of sugar by it did not appear to be in furtherance of its selling operations. It asserts that under the "primary-business" test, hereinafter described, its transportation of sugar should be found to be incidental to and part of its brokerage operations and therefore private carriage. In reply to Bureau contends (1) that such transportation is not incidental to or in furtherance of Fraering's nontransportation business, (2) that, conceding that Fraering has a bona fide business as a broker of sugar, the existence of such a business does not of itself preclude a finding that the transportation of the concerned sugar is for-hire transportation, and (3) that its principal consideration in transporting the sugar is compensation earned by such transportation.

In No. MC–C–2055, division 1 instituted an investigation, by order dated November 5, 1956, under section 204(c) of the act, for the purpose of determining (1) whether Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, of San Antonio, Tex., hereinafter called the Shannons, have been and are engaged in the transportation of property as a common or contract carrier by motor vehicle in violation of section 206(a)(1) or 209(a)(1) of the act, and (2) whether J. T. Wilcox has been and is engaged in transactions as a broker in violation of section 211 of the act.

After hearing, the examiner found that the Shannons are engaged in the business of buying and selling livestock, livestock feedstuffs, molasses, grain, salt, and sugar; that the transportation in their own vehicles of the sugar to which they hold title is in the furtherance of their primary noncarrier commercial enterprise; that under the "primary business" doctrine such transportation constitutes private carriage; and that the investigation should be discontinued. No evidence was presented at the hearing tending to show [fol. 19] any unauthorized brokerage operations by respondent J. T. Wilcox, and the proceeding as to this respondent will be discontinued.

On exceptions the Bureau maintains (1) that the examiner erred in finding that the Shannons' transportation of sugar is in furtherance of a primary commercial enterprise other than transportation and hence private carriage, (2) that they transport sugar, not as a private carrier, but with the purpose of profiting from the transportation in the same manner as any for-hire carrier does, (3) that the purchase and sale of sugar is merely a device to procure a payload for vehicles which would otherwise return empty, (4) that the small storage of sugar at San Antonio, the direct deliveries to ultimate users, and the small profit (less than prevailing transportation costs) netted by respondents are all indicia of for-hire carriage, (5) that the close proximity of the dates of purchase to the dates of delivery to such users strongly indicates purchases by respondents to fill orders previously secured despite contrary claims, and (6) that taken together the foregoing facts require a finding that the Shannons are engaged in the interstate transportation of sugar as either a common or contract carrier by motor vehicle without appropriate authority from this Commission. In reply the Shannons assert that their primary business is that of buying and selling livestock, grain feed, sugar, and other commodities; that their transportation of sugar is in furtherance of their noncarrier commercial activities and a necessary incident thereto; and that the findings of the examiner should be adopted.

The recommendations of the examiners, the exceptions, and the replies thereto have been considered in the light of the evidence. We find the statements of facts in the examiners' reports to be adequate in all material respects, and, as modified here, we adopt them as our own. Certain facts will be repeated herein for clarity of discussion.

No. MC–C–1994.—Fraering, operating a warehouse at New Orleans, engages in wholesale selling of canned foods, dried fruits, nonfood items, and certain specialty items, hereinafter collectively called groceries. In addition to wholesaling its own groceries, it sells some other grocery items as a broker, and acts as a broker of refined sugar produced by the South Coast Corporation of New Orleans, hereinafter called South Coast. Fraering's transportation

of its own groceries admittedly is conducted as part or as an incident of its primary business, the sale and brokerage of certain products and, as such, its operations relating to these commodities are those of a private carrier. Fraering transports only a relatively small portion of brokered groceries compared to its own commodities and, to a great extent, only as an accommodation to those with whom it [fol. 20] deals. Since the charge per case for this transportation of brokered groceries does not vary with distance traveled, only some of this transportation is profitable. The transportation of brokered groceries does not appreciably affect Fraering's cost of operation. This described transportation of brokered goods other than sugar is private carriage in bona fide furtherance of Fraering's wholesale and brokerage business. The transportation by Fraering in its own vehicles of its own groceries and of the grocery items it brokers is not challenged. It is Fraering's activities with respect to the transportation of sugar which concern us here.

Within a defined area of the South and Southwest, Fraering is the exclusive selling agent for sugar produced by South Coast at Matthews, La., some 40 or 50 miles from New Orleans. Of the 8 million pounds of sugar sold by Fraering for South Coast, between September 1955 and January 1956, all but 810,000 pounds moved by for-hire carriers from Matthews directly to the various consignees. The remaining 810,000 pounds were handled by Fraering in its own tractor-trailer units of which it has four. These four units of equipment also were utilized to move groceries. Fraering's representative indicates (1) that Fraering only transports a load of sugar when it can be moved in conjunction with a grocery movement in the opposite direction; (2) that it has more groceries moving toward New Orleans from points in the Rio Grande Valley of Texas than sugar shipments in the other direction, and only utilizes rail carriers for the sugar movements when it is impossible to correlate an inbound grocery shipment with an outbound sugar shipment; (3) that, generally, the charge made for sugar transportation would little more than cover the cost of operation, and in some instances the charge for the transportation plus brokerage fees does not entirely cover the

cost of operation of the trucks while loaded with a particular sugar shipment; (4) that, even though there are other benefits in using private carriage rather than for-hire carriage, the principal incentive for Fraering's transportation of sugar is that the sugar constitutes return lading for trucks moving its groceries in the opposite direction; and (5) that the revenue received is adequate to assure overall profitable operations inasmuch as the cost of transportation on the commodities moving in the opposite direction is sharply reduced by the sugar backhaul.

Fraering takes possession of the sugar at Matthews and assumes responsibility for it while it is in transit but does not take title to it. South Coast is paid by the consignee for the sugar f.o.b. Matthews, and any transportation charge for carriage performed by Fraering, whether collected directly by it or collected by South Coast, belongs to Fraering. In the sale of sugar as a broker, Fraering enters into [fol. 21] contracts with buyers on contract forms of South Coast or sells sugar on spot quotations from the refinery. It receives a brokerage fee which is unrelated to whether the sugar moves by for-hire carriage or by private carriage.

One of the principal purchasers of sugar produced by South Coast is located at Harlingen, in the Rio Grande Valley of Texas. Most of the sugar sold by Fraering to this buyer is transported by Fraering from the refinery to Harlingen. Fraering regularly purchases substantial quantities of groceries from a source of supply at Donna, Tex., about 23 miles west of Harlingen, and sometimes moves such commodities to New Orleans in conjunction with sugar hauls to Harlingen. On the movement of sugar from Matthews to Harlingen, Fraering collects 53.59 cents per 100 pounds over and above the cost of the sugar at point of origin; this compares with transportation charges of 73 cents per 100 pounds by rail in carloads and $1.10 per 100 pounds, in truckload quantities by use of regulated for-hire motor carriers. There is some indication of record that Fraering provides the over-the-road transportation from the refinery to other sugar customers including military installations at points other than Harlingen, but its method of operation with respect to such customers and the relationship of such operations to its primary business is not

sufficiently developed in this record to further merit our consideration.

No. MC-C-2055.—The facts pertaining to the business activities and transportation engaged in by the Shannons are as follows: E. and R. Shannon, with headquarters and a warehouse at San Antonio, have been engaged as a partnership in the business of buying and selling livestock since 1934, and in connection therewith have transported livestock as a bona fide private carrier. In or about 1951 their activities were expanded to include the purchase and resale of grain, fertilizer, molasses, and salt, and in 1954, of sugar. They operate seven trucks which are used in connection with some deliveries to customers of the commodities in which they deal. On shipments of livestock and some other commodities (not including sugar) they use common carriers to some extent but have never used for-hire carriage for the transportation of sugar. No one questions but that the primary business of the Shannons is that of a dealer in livestock and related items above named except sugar, and that the transportation by them of all of the named commodities, except sugar, is primarily in furtherance of their main or principal business. In dealings which correspond with movements of livestock transported to destinations in southern Louisiana, the Shannons have been purchasing sugar, in 100-pound bags, from a refinery at Supreme, La., and transporting and selling it to purchasers, the majority [fol. 22] of whom are located in San Antonio. The distance from Supreme to San Antonio is 525 miles. All purchases from the refinery are made on credit, subject to a 2-percent discount if payment is made within 10 days, and the sales by the Shannons at San Antonio are made on the same terms.

An investigation by the Commission's district supervisor indicates that the sugar transported by the Shannons is customarily loaded at the refinery, moved directly to and unloaded at the place of business of the purchaser, although sometimes loads are delivered to the Shannons' warehouse at San Antonio and subsequently sold to users in small lots of from 1 to 25 bags. At the hearing the dominant partner maintained that the sugar transported is never

sold until after it has left Supreme and is en route to San Antonio; but there are some contrary indications of record, and it is clear that whenever sugar transportation is not coordinated with an appropriate backhaul, it is transported to fill an order obtained in advance. On one occasion the Shannons were forced to use a public warehouse for a truckload of sugar because of space limitations of their own warehouse and, generally, the record supports a finding that sugar sales usually are made by the Shannons after it is en route or has arrived at their warehouse.

Based on the going market price, a bona fide dealer at San Antonio will normally realize a profit of from 25 to 35 cents per hundred pounds on sugar. The Bureau submitted an exhibit covering 15 truckloads of sugar transported by the Shannons from Supreme to San Antonio during the period from May to August 1956, on which the net profit to them, based upon the difference between the price paid at Supreme and that received at San Antonio, including transportation, ranged from 27 to 47 cents a hundred pounds, and averaged 35.74 cents per hundred pounds. The Bureau argues that the profits realized by the Shannons from their sugar sales and those realized by bona fide sugar dealers at San Antonio are not directly comparable because the former are computed without regard to transportation costs whereas the latter necessarily allow for such costs. Compared to the Shannons' average profit of 35.74 cents per hundred including transportation, the record indicates that the applicable rail carload and motor truckload rates on sugar moving from and to the same point is 69 and 109 cents per hundred pounds, respectively. The 15 truckloads listed by the Bureau were resold in San Antonio within from 1 to 2 days after their pickup at Supreme. The Shannons' explanation of the rapid turnover is that sugar is highly perishable, being particularly susceptible to damage by dampness; that it is subject to sudden and drastic price fluctuations; and that consequently all dealers make a prac-
[fol. 23] tice of selling it as quickly as possible in order to forestall any loss. They frankly admit, however, that the principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements

of livestock and other commodities from San Antonio and that in order to make a profit on the sugar haul they have to have traffic moving from San Antonio to Louisiana.

DISCUSSIONS AND CONCLUSIONS

In *Lenoir Chair Co. Contract Carrier Application,* 51 M.C.C. 65, 75, hereinafter called the *Lenoir* case, it was said that, if the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. This decision was affirmed by the Supreme Court of the United States in *Brooks Transp. Co., Inc.,* v. *United States,* 340 U. S. 925.

Subsequent to the taking of evidence in the instant proceedings, section 203(c) of the act was amended (in August 1958) to read:

Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Amendment of this section had the effect, among other things, of writing into the act our usual or "primary business" test by which we determine whether questioned transportation activities of those also engaged in business enterprises other than transportation are within the scope of lawful private carriage or of motor-carrier operations for compensation for which authority from this Commission is

required. From the portion of the legislative committee reports relating to the amendment of section 203(c) set forth in appendixes A and B hereto it is clear that insofar as the test expressed in the *Lenoir* case is concerned, the amended section is not intended to change, but to codify, the law with respect to the test for the determining of what transportation activities are permitted within the scope of lawful private carriage. It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as neither [fol. 24] Fraering nor the Shannons are engaged in transportation as a primary business, is whether the sugar transportation operations of Fraering or of the Shannons are in bona fide furtherance of the primary business of the respective respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed.

In each of the proceedings before us, the respondents are primarily engaged in certain noncarrier commercial enterprises. The respondents concededly are performing some transportation as private carriage within the scope, and in furtherance, of their respective primary business enterprises. In order to determine the status of their sugar transportation activities, we must consider both their primary business and the particular facts relating to each of the transportation operations performed.

Fraering is primarily a wholesaler and broker of certain grocery items but contends that its primary business includes the brokerage of sugar. Its transportation activities include the carriage of such commodities as canned foods, dried fruits, nonfood items, and certain specialty items. They also include the carriage of sugar. We are concerned here with how its sugar brokerage differs, if at all, from its wholesale and other brokerage business enterprise and how its sugar transportation activities differ, if at all, from its transportation activities which are concededly in furtherance of its primary business. The Shannons are engaged in buying and selling livestock and certain related items including, according to their contention, sugar. Similarly, we are concerned here with how their sugar dealings

differ, if at all, from their dealings in the other commodities and how their sugar transportation activities which are admittedly in furtherance of their primary business.

Fraering wholesales certain commodities for profit and, in fact, derives from its wholesaling enterprises most of its business profit. Its brokerage of certain grocery items does not change its basic wholesaling operation but, rather, adds to its line a few complementary items which are handled in a manner similar to those it sells as a wholesaler and does not change its profit sources or expectations. The handling of these items as a wholesaler or broker is its primary business from which it expects, without relying on profit which is expected to accrue from transportation activities, to make a profit. Its dealings in sugar, which it sells as a broker but does not transport and on which it merely profits as a broker, appears to be an enterprise similar to, or even a part of, its primary business. However, its dealings in some sugar, as in the situation where it buys at Matthews and sells at Harlingen, wherein the principal reason, clearly expressed in the record in the title proceeding, for such deal-[fol. 25] ings is the generation of sugar shipments which it can transport as return lading for its trucks which are moving in the opposite direction, cannot be considered to be a part or within the scope of its primary business. That its activities with respect to this described sugar which it transports have a purpose different from the purposes of its primary business can be more clearly seen when it is considered that such sugar transportation is not believed by it to be undesirable or without profit even when the transportation charge plus brokerage fees do not entirely cover the cost of operation of the truck transporting the particular sugar shipment. It is clear that the purpose of its engaging in the brokerage of such sugar and the transportation thereof from Matthews to Harlingen is to reduce the cost of transporting groceries (owned by it) from Donna to New Orleans. The "reduction of the cost of transportation" of the other commodities from Donna to New Orleans constitutes a profit from the transportation of sugar from Matthews to Harlingen, and we are satisfied that its operations with respect to the sugar which it transports from Matthews to Harlingen are undertaken "for the purpose of

profiting from the transportation as such." In the *Lenoir* case we said that a finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that motor operations are conducted in bona fide furtherance of its other and primary enterprise. We have that situation here. Inasmuch as Fraering's transportation of sugar from Matthews to Harlingen makes its grocery transportation in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which the grocery transportation is performed. It can, however, at most, be considered to be in furtherance of certain lawful private transportation operations of Fraering, and only secondarily related to the primary business of Fraering, which is again, a noncarrier commercial enterprise. It is our opinion that, while its transportation of commodities other than sugar are in furtherance of its primary business, its transportation of the sugar, which it transports from Matthews to Harlingen, with respect to its primary business, is a related or secondary enterprise conducted with the purpose of profiting from the transportation performed and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

The Shannons have long been buying and selling certain commodities and in connection therewith transporting them to purchasers, in bona fide furtherance of their primary business, as a dealer in those commodities. The Bureau [fol. 26] concedes that the transportation of livestock and certain related items is within the scope of lawful private carriage, but argues, in essence, that the here considered sugar transportation operation is undertaken to make profitable their lawful private-carrier activities in the opposite direction; is no more than a related or secondary enterprise, with respect to their primary business, inasmuch as it is conducted with the purposes of profiting from the transportation as such; and, as a consequence, is for-hire transportation subject to the licensing provisions of the act. There can be no question but that the considered sugar transportation and the transportation admittedly within the

scope of their lawful private carrier activities tend to support one another and that part of the profit of each is the reduction of the cost of the other. It also seems clear that, in many instances, for example at the time of the hearing, dealership in the sugar by the Shannons would not be conducted at a profit without the benefit of backhaul traffic. In fact, the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio. Although there are vague representations of record that the Shannons have transported sugar from Supreme to some points in Texas on occasions when the shipments were not coordinated with backhauls of livestock or feeds, the dominant partner, in discussing such movements describes such a situation as one wherein they had an order, made a special trip to Supreme, and got "more" money for hauling the particular load of sugar handled under the arrangement. This situation in itself constitutes for-hire carriage within the doctrine of *Jay Cee Transport Co. Contract Carrier Application*, 68 M.C.C. 758, which holds, in part, that in a situation where a person actually does nothing but transport commodities from its suppliers to the users thereof, the fact that the person takes title to the goods is not sufficient to establish the person's status as a private carrier. The more usual arrangement under which they operate, however, appears to be one in which the Shannons have no preexisting sugar order, but buy with the intention of selling later either en route or after the transportation is accomplished. This procedure is ordinarily coordinated with a backhaul, and the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction. We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San [fol. 27] Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from

the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such. Inasmuch as their transportation of sugar makes their transportation of other commodities in the opposite direction more profitable, to this extent, it is an enterprise which has an indirect relation to the primary noncarrier business in furtherance of which their transportation of other commodities is performed. But it can, at most, be considered to be in furtherance of certain lawful private transportation operations of the Shannons, and only secondarily related to their primary business, which, again, is a noncarrier commercial enterprise. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required; and we so find.

We find in No. MC-C-1994 that Fraering Brokerage Company, Inc., has been and is engaging in transportation, in interstate commerce, of sugar from Matthews, La., to Harlingen, Tex., for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring it to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

We find in No. MC-C-2055 that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, have been and are engaging in transportation, in interstate commerce, of sugar from Supreme, Va., to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act; and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from this Commission.

And, we further find in No. MC-C-2055 that J. T. Wilcox has not been shown to have engaged in any transactions

as a broker of transportation in violation of section 211 of the act and that the proceeding should be discontinued as to respondent J. T. Wilcox.

Orders will be entered (1) requiring Fraering Brokerage Company, Inc., and Emma Shannon and Richard J. Shannon, in the respective proceedings, to cease and desist forth- [fol. 28] with, and hereafter to abstain, from participation in any operation, in interstate or foreign commerce, of the character found in this report to be unlawful, unless and until there is in force and effect, with respect to such carriage, appropriate authority therefor, and, (2) in the sub-title proceeding, discontinuing the proceeding as to respondent J. T. Wilcox.

COMMISSIONER WEBB, dissenting in part:

I am unable to concur in the finding in No. MC-C-1994 that the respondent, Fraering, is engaged in for-hire transportation of sugar. Fraering is a bona fide broker of sugar, and this report concedes that its sugar business appears to be a part of its primary business. In the circumstances, it is my opinion that the evidence warrants the conclusion that its transportation of sugar is in furtherance of its primary (nontransportation) business and is a true private carriage operation.

I agree with the findings in No. MC-C-2055. The evidence warrants the conclusion that respondents-Shannons, unlike Fraering, are not bona fide dealers in sugar despite their maintenance of a rather small sugar inventory at their San Antonio storage facility. They are properly found to be unlawfully engaged in for-hire transportation.

APPENDIX A TO EXHIBIT B TO COMPLAINT

Portion of Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce on S. 3778 relating to amendment of section 203(c) of the act

7. ECONOMIC REGULATION OF COMMERCIAL TRANSPORTATION

A matter of serious concern to the subcommittee is the growing practice of persons engaging in the commercial

transportation of property by motor vehicle under circumstances that do not constitute bona fide private carriage, as that term is properly understood, but that nonetheless enable them to evade the economic regulation to which common and contract carriers by motor vehicles are subject even though the transportation services performed are not specifically exempt from such regulation. Most frequently, perhaps, evasion of the economic regulation to which it is intended that all for-hire carrier transportation of property other than that specifically exempted shall be subject is accomplished under the guise of private carriage.

The enormous growth of commercial private carriage of property by motor vehicle in recent years, resulting as it has in a continuing erosion of huge volumes of traffic that would otherwise be available for transportation by public carriers, is a serious problem for the railroads and other common carriers. To the extent that this growth has occurred in bona fide private carriage, i.e., the transportation of one's own materials, supplies, and products in one's own vehicles within the scope and in furtherance of one's primary business enterprise (other than transportation), there is no room for complaint; but there is just cause for complaint as to motor carriage which although performed under the guise of private transportation is actually public transportation. Not only do the purveyors of the transportation service evade economic regulations; but in many instances payment of the Federal transportation excise taxes is also [fol. 29] avoided, for the tax on amounts paid for the transportation of property is not levied on proprietary transportation.

Various subterfuges are employed to evade economic regulation and avoid imposition of the transportation excise taxes. The one most commonly used is the so-called buy-and-sell method of operation involving the issuance of bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. Another is the blackhaul method of operation increas-

ingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.

There are numerous variations but, whatever the precise nature of the subterfuge employed, carriage of this sort undermines the strength of the regulated for-hire carriers and in so doing it also injures the public which is largely dependent upon regulated for-hire carriage for its transportation requirements. Protection is needed from destructive competition of this kind.

The Interstate Commerce Commission has said that this is one of the problems of most serious concern to it in administration of the Interstate Commerce Act, that where so-called private carriage is a subterfuge for engaging in public transportation it constitutes a growing menace to shippers and carriers alike, being injurious to sound public transportation, promoting discrimination between shippers, and threatening existing rate structures. It was to curb just such practices that part II of the Interstate Commerce Act was enacted.

In the first session of the present Congress (Public Law 85-163, approved August 22, 1957) the Interstate Commerce Act was amended to prohibit one (except as otherwise specifically provided) from engaging in any "for-hire transportation business by motor vehicle" in interstate or foreign commerce without a certificate or a permit authorizing such transportation. This prohibition is expected to prove helpful in correcting certain of the abuses described, but it appears that loopholes may still remain. What is needed, in the opinion of the subcommittee, is a further prohibition to the effect that no person in any commercial enterprise other than a duly authorized or specifically exempt for-hire transportation business shall transport property by motor vehicle in interstate or foreign commerce unless such transportation is solely within the scope and in furtherance of a pri-

mary business enterprise (other than transportation) of such person.

With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (*a*) duly certificated common carriage, (*b*) duly permitted contract carriage, or (*c*) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in Brooks Transportation Co. v. U.S, (340 U.S. 925 (1951)), so sacrosanct to the pri-[fol. 30] vate carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

APPENDIX B TO EXHIBIT B TO COMPLAINT

Portion of House Report No. 1922 of the Committee on Interstate and Foreign Commerce on R. 12832 relating to amendment of section 203(c) of the act

PSEUDO-PRIVATE CARRIAGE

(Sec. 7, amending sec. 203(c) of the act)

The erosion of traffic of regulated carriers has also been caused to a considerable extent by the growth of "pseudo-private carriage" by truck. One of the subterfuges most commonly used in this type of carriage is the "buy-and-sell" arrangement, whereby fictitious bills of sale and invoices are used to make it appear that the commodities being transported by truck are those of the vehicle owner and operator and that the transportation involved is private carriage. The real business of persons engaged in this type of operation is, in fact, transportation, and the movement

of goods performed by them is not in furtherance of any primary, or bona fide business enterprise other than transportation.

In addition, business which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

The pseudo-private carriage is a subterfuge for engaging in public transportation without complying with the certificate or permit requirements of the Interstate Commerce Act. It constitutes a growing menace to shipper and carrier alike, and is not in the public interest. It is injurious to sound public transportation. It promotes discrimination between shippers and threatens the existing rate structures of regulated carriers. It makes possible the avoidance of payment of the Federal transportation of property tax, for this tax is not levied on the transportation of property owned by the carrier.

The Interstate Commerce Commission has found it most difficult to cope effectively with this problem under the present provisions of the Interstate Commerce Act. The Commission has urged the Congress for several years to make legislative changes in the act to eliminate these practices, and it drafted a bill to accomplish this objective, which was introduced as H.R. 5825, 85th Congress. That bill proposed to amend the definition of "private carrier" in section 203(a)(17) of the act by adding a proviso thereto to the effect that any person who purchases, transports and sells property for the purpose of fostering a highway transportation business is engaging in a public transportation service and shall be subject to economic regulation by the Commission.

During the committee's hearings on H.R. 5825, many witnesses expressed the fear that if the definition of a private

carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the Lenoir Chair case (51 M.C.C. 65 (1949)) and by the United States Supreme Court in the Brooks case (Brooks Transportation Co. v. United States, 340 U.S. 925 (1951)).

In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doc- [fol. 31] trine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for-hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor vehicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision.

In the first session of the 85th Congress the Interstate Commerce Act was amended (by Public Law 85-163) by the addition of section 203(c) which prohibits a person, except as otherwise specifically provided in the act, from engaging in any for-hire transportation business by motor vehicle in interstate or foreign commerce without a certificate or permit to authorize such transportation. This prohibition is expected to prove helpful in correcting certain abuses, but it appears that the abuses resulting from pseudo-private carriage are not adequately dealt with by section 203(c).

Under these circumstances several witnesses recommended, and this committee favors, the further amendment to section 203(c) of the act contained in section 7 of the reported bill. This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and

in furtherance of, a primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in the Brooks case.

[fols. 32-42] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 3rd day of August, A. D. 1959.

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION OF OPERATIONS

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS

These proceedings having been duly instituted, and full investigation of the matters and things involved having been made, and the said division having, on the date hereof, made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof;

It is ordered, That the respondent in No. MC-C-1994, be, and it is hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, from all operations in interstate or foreign commerce of the character found in said division report to be unlawful, unless and until appropriate authority therefor is obtained.

It is further ordered, That respondents Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in No. MC-C-2055, be, and they are hereby, notified and required to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character

found in the said division report to be unlawful, unless and until appropriate authority therefor is obtained.

It is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as September 18, 1959.

And it is further ordered, That proceeding No. MC-C-2055, as to J. T. Wilcox be, and it is hereby, discontinued.

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 43] EXHIBIT C TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of April A. D. 1960.

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC., INVESTIGATION OF OPERATIONS
(New Orleans, La.)

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS
(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

(1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC-C-1994, filed September 30, 1959, for reconsideration;

(2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC-C-2055, filed September 8, 1959, for reconsideration;

(3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;

(4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

It is ordered, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 44] [File endorsement omitted]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed July 21, 1960

Defendants, United States of America and Interstate Commerce Commission, answer the complaint, as follows:

I.

Defendants, for purposes of this action, admit the allegations in paragraphs numbered 1 through 4, except:

(a) With reference to paragraph 1, they aver that the investigation docketed as No. MC-C-2055, Emma Shannon

et al., Investigation of Operations, was instituted by order of the Commission, Division 1, entered November 5, 1956, and respectfully refer the Court to said order for an accurate and complete statement of the scope of that investigation.

(b) With reference to paragraph 4, they deny that the 1957 and 1958 amendments to the Interstate Commerce Act, [fol. 48] 49 U.S.C. § 303(c), 71 Stat. 411, 72 Stat. 574, should not have affected plaintiffs, and they deny further that the recommended report and order of the hearing examiner should have been adopted by the Commission, Division 1.

II.

Defendants deny the allegations in paragraphs numbered 5 and 6, except, with reference to paragraph 6, they admit plaintiffs have been and are engaged in the business of buying and selling livestock, grain, fertilizer, molasses, salt and sugar, and that in the proceeding before the Commission no one questioned that the transportation by them of all of the named commodities, except sugar, was in furtherance of their primary business, as dealers in those commodities, and hence, was within the scope of lawful private carriage.

III.

Defendants deny that the Commission is under any obligation to produce any or all of the documents listed in paragraph numbered 7, and they aver that the duty of presenting to this Court a certified copy of the record before the Commission, or any portion thereof, rests upon the plaintiffs.

IV.

As defendants are without information or knowledge sufficient to form a belief as to the allegations in paragraph numbered 8, and furthermore, as the Commission, Chairman Winchell, by order entered June 2, 1960, upon consideration, inter alia, of the pendency of the instant action, [fol. 49] postponed from May 23, 1960, until further order

of the Commission the effective and compliance date as established by the assailed order of April 5, 1960, defendants deny the allegations in paragraph numbered 8.

V.

In further answer to the complaint, defendants aver that the Commission properly found upon substantial evidence of record and the applicable law that the plaintiffs have been and are engaged in transportation in interstate commerce of sugar from Supreme, La., to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority, in violation of section 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. §§ 306(a) or 309(a), and that the actions of the Commission were valid and lawful in all respects.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief sought in the complaint be denied, and that the complaint be dismissed.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Robert A. Bicks, Acting Assistant Attorney General.

Russell B. Wine, United States Attorney, San Antonio, Texas.

Attorneys for United States of America.

Fritz R. Kahn, Attorney, Interstate Commerce Commission, Washington 25, D. C.

Robert W. Ginnane, General Counsel.

Attorneys for Interstate Commerce Commission.

[fol. 50] Certificate of Service (omitted in printing).

[fol. 51] Certificate of Service by Mail (omitted in printing).

[fol. 52] [File endorsement omitted]

[fol. 53] [File endorsement omitted]

[fol. 54]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON d/b/a E. and R. SHANNON, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

MOTION OF RED BALL MOTOR FREIGHT, INC., AND DENVER-AMARILLO RED BALL MOTOR FREIGHT, INC., FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed July 26, 1960

Come now Red Ball Motor Freight, Inc., and Denver-Amarillo Red Ball Motor Freight, Inc., and respectfully move this Honorable Court for leave to intervene as Defendants pursuant to 28 U.S.C.A., Section 2323, and Rule 24 F.R.C.P., and for cause would show:

I.

Red Ball Motor Freight, Inc., is a common carrier of property, operating under Interstate Commerce Commission Certificate No. MC-2229 and Subs thereunder. It is a corporation, organized and existing under the laws of the State of Delaware, with its principal office and place of business in Dallas, Dallas County, Texas.

Denver-Amarillo Red Ball Motor Freight, Inc., is also a common carrier of property, operating under Interstate Commerce Commission Certificate No. MC-105265 and Subs thereunder.

[fol. 55] Wherefore, Red Ball Motor Freight, Inc., and Denver-Amarillo Red Ball Motor Freight, Inc., pray that they be permitted to intervene as parties defendant herein, on the side of the Interstate Commerce Commission, and that they be granted leave to file the Answer attached hereto.

Respectfully submitted,

Clark, Mathews, Thomas, Harris and Denius.

Charles D. Mathews.

James H. Keahey, P. O. Box 858, 1020 Brown Building, Austin 65, Texas.

Attorneys for Intervenors, Red Ball Motor Freight, Inc. and Denver-Amarillo Red Ball Motor Freight, Inc.

[fol. 59]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Civil Action No. 2840

[Title omitted]

MOTION OF BROWN EXPRESS, INC., CENTRAL FREIGHT LINES INC., TEXAS-ARIZONA MOTOR FREIGHT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND TEXAS TANK TRUCK CARRIERS ASSOCIATION, INC., FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed August 12, 1960.

To the said Honorable Court:

Come now Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc., pursuant to the provisions of the United States Code, Title 28, Section 2323, and Rule 24, F.R.C.P., and move for leave to intervene as defendants in this action, to

file the answer attached hereto, and to participate by brief, oral argument and otherwise in presenting to the Court their interest in the matters and questions in controversy. For grounds movants would show:

I

The above-styled and numbered cause is an action by plaintiffs to enjoin, annul and set aside a certain final order of the Interstate Commerce Commission in its Docket MC-C-2055 requiring plaintiffs to cease and desist forthwith, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce of the character found in the Report of the Commission, Division 1, to be unlawful, involving the transportation of sugar from Supreme, Louisiana, to San Antonio and other Texas points, unless and until appropriate authority therefor is obtained from said Commission. Jurisdiction is invoked by plaintiffs under the provisions of the United States Code, Title 28, Sections 2321 et seq., as well as other related provisions of said Code.

[fol. 60]

II

Movants, jointly and severally, are interested in this controversy, in the question of pseudo-private carriage of property, and in the matter of proper and uniform interpretation and enforcement of Section 203(c) of the Interstate Commerce Act which are involved in the Commission's decision and order now before this Court. In this connection movants would show that:

1. Brown Express, Inc., a Texas corporation with general offices at San Antonio, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-46054 and in sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-46054 Brown Express, Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 350 other Texas points. In accordance with said certificated authority, and by means of its

large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Brown Express, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

2. Central Freight Lines Inc., a Texas corporation with general offices at Waco, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-30867 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-30867 Central Freight Lines Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 450 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Central Freight Lines Inc. offers trans- [fol. 61] portation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

3. Texas-Arizona Motor Freight, Inc., a New Mexico corporation with general offices at El Paso, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-59894 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-59894 Texas-Arizona Motor Freight, Inc. is author-

ized to transport general commodities, including sugar, between Houston, San Antonio, and over 125 other Texas points and over 250 other points in New Mexico, Arizona and California. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Texas-Arizona Motor Freight, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

4. The Regular Common Carrier Conference of the American Trucking Associations, Inc. with headquarters at Washington, D. C., is a non-profit incorporated association of more than 2,000 duly authorized general commodity common carriers of property by motor vehicle, such as Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., and Red Ball Motor Freight, Inc. The members of the Regular Common Carrier Conference comprise a division or Conference of the American Trucking Associations, Inc., a non-profit corporation constituting the national trade association of the trucking industry. The Regular Common Carrier Conference is organized primarily to foster, protect and promote the interests of general commodity common carriers of freight and to advance such interests through cooperation and organization, including protection of the franchised operations of such common carriers from unlawful and unauthorized competition from other for-hire carriers.

[fol. 62] 5. The Texas Tank Truck Carriers Association, Inc., with headquarters at Austin, Texas, is a non-profit Texas corporation whose members are irregular route carriers of various types of property, including sugar, by tank and other specialized types of motor vehicles operated in Texas and in numerous other states and areas. The members of the Texas Tank Truck Carriers Association, Inc. who are engaged in such transportation in interstate and foreign commerce within Texas, Louisiana and elsewhere

operate pursuant to franchises and operating rights duly and lawfully granted to such members by the Interstate Commerce Commission in the form of certificates of public convenience and necessity or in the form of contract carrier permits. The Texas Tank Truck Carriers Association, Inc. is organized primarily to foster, protect and promote the interests of its members through cooperation and organization, including protection of the franchised operations of such members from unlawful and unauthorized competition from other for-hire carriers.

Movants' substantial interest in the outcome of this litigation and of this Court's decision concerning the lawfulness of the disputed transportation operation of plaintiffs without appropriate authority from the Interstate Commerce Commission is further shown by the fact that this Court's decision will unquestionably have a material bearing upon the competition that certificated and permitted common and contract carriers of all types of property will encounter in the future not only in this particular area but throughout the Southwest and, indeed, the entire nation. Such competition will vastly increase if construed to be lawful under the terms of said Section 203(c) of the Act, as amended, and will inevitably render it more difficult for regulated carriers to provide adequate and continuous service to the general public as contemplated by the Interstate Commerce Act and the National Transportation Policy and as required by the terms and conditions of the certificates issued to movants and to all certificated common carriers.

Therefore, movants have a vital and direct interest in the controversy and questions involved in this litigation within the meaning of the United States Code, Title 28, Section 2323, and Rule 24, F.R.C.P.

III

The granting of this motion will not unduly delay or prejudice the adjudication of the rights of the original [fol. 63] parties. Movants' proposed pleading would in no respect enlarge or change the issues raised by the pleadings of the original parties. Further, movants are advised of the dates set by the Court for the filing of plaintiffs'

opening brief, defendants' opening brief, and plaintiffs' reply brief, and, if leave to intervene is granted, movants are prepared to comply therewith.

Wherefore, Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc. pray that they be permitted to intervene as parties defendant herein, on the side of the United States of America and the Interstate Commerce Commission, and that they be granted leave to file the Answer attached hereto.

Respectfully submitted,

Charles E. Crenshaw, Perry-Brooks Building, Austin 1, Texas.

Roland Rice, 618 Perpetual Building, Washington 4, D. C.

Phillip Robinson, 401 Perry-Brooks Building, Austin 1, Texas.

Attorneys for Movants, Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., Texas Tank Truck Carriers Association, Inc.

Of Counsel:

Rice, Carpenter and Carraway, 618 Perpetual Building, Washington 4, D. C.

Smith, Robinson and Starnes, 401 Perry-Brooks Building, Austin 1, Texas.

[fol. 64] Notice of Motion (omitted in printing).

REQUEST FOR SETTING

Come now Charles E. Crenshaw, Roland Rice, and Phillip Robinson, attorneys for Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., the Regular Common Carrier Conference of the American

Trucking Associations, Inc., and the Texas Tank Truck Carriers Association, Inc. and request that the foregoing Motion For Leave To Intervene As Defendants be placed on the motion docket of the Court for Monday, August 15, 1960, or as soon thereafter as the business of the Court will allow.

Charles E. Crenshaw
Roland Rice
Phillip Robinson

[fol. 65] Proof of Service (omitted in printing).

[fol. 66] [File endorsement omitted]

[fol. 126]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON, Complainants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents,

RED BALL MOTOR FREIGHT, INC., DENVER-AMARILLO RED BALL MOTOR FREIGHT, INC., BROWN EXPRESS, INC., CENTRAL FREIGHT LINES, INC., TEXAS-ARIZONA MOTOR FREIGHT INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., and TEXAS TANK TRUCK CARRIERS ASSOCIATION, INC., Intervenors.

ORDER ALLOWING INTERVENTION AS DEFENDANTS—Signed August 20, 1960 and Entered August 24, 1960

This Cause coming before this Statutory Court convened pursuant to provisions of applicable statutes, on the mo-

tions of the Red Ball Motor Freight, Inc. and Denver-Amarillo Red Ball Motor Freight, Inc., and of the Brown Express, Inc., Central Freight Lines, Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc. and Texas Tank Truck Carriers Association, Inc. for leave to intervene as party defendants, and it appearing that the intervention should be permitted, it is therefore

Ordered that the said motions be granted, and the Red Ball Motor Freight, Inc., Denver-Amarillo Red Ball Motor Freight, Inc., Brown Express, Inc., Central Freight Lines, Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., and Texas Tank Truck Carriers Association, Inc., Intervenors, are hereby made parties defendant and their tendered answer be filed, subject to all legal objections which are reserved to the hearing on the merits. Briefing schedules, etc. shall be that of defendants.

[fol. 127] Dated at Austin, Texas, this 20 day of August, 1960.

By the Court:

John R. Brown, United States Circuit Judge, Allen B. Hannay, United States District Judge for the Southern District of Texas, Ben H. Rice, Jr., United States District Judge for the Western District of Texas.

[fol. 128] [File endorsement omitted]

[fol. 148]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. AND R. SHANNON, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Trial Brief of Defendant Interveners Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., and Texas Tank Truck Carriers Association, Inc.—Served September 7, 1960

To the Said Honorable Court:

* * * * * * *

[fol. 153]

Interveners' Services, Facilities and Interests

Brown Express, Inc., a Texas corporation with general offices at San Antonio, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-46054 and in sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-46054 Brown Express, Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 350 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equip-

ment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Brown Express, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

Central Freight Lines Inc., a Texas corporation with general offices at Waco, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating [fol. 154] rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-30867 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-30867 Central Freight Lines Inc. is authorized to transport general commodities, including sugar, between Houston, San Antonio, and over 450 other Texas points. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Central Freight Lines Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

Texas-Arizona Motor Freight, Inc., a New Mexico corporation with general offices at El Paso, Texas, is a regular route motor common carrier of property operating in interstate and foreign commerce pursuant to franchises and operating rights duly and lawfully granted to it by the Interstate Commerce Commission in Certificate of Public Convenience and Necessity No. MC-59894 and sub-numbered proceedings thereunder. In accordance with said Certificate No. MC-59894 Texas-Arizona Motor Freight, Inc. is authorized to transport general commodities, including sugar,

between Houston, San Antonio, and over 125 other Texas points and over 250 other points in New Mexico, Arizona and California. In accordance with said certificated authority, and by means of its large fleet of equipment, by means of its terminal, communications, and other facilities, and by means of its highly trained staff, Texas-Arizona [fol. 155] Motor Freight, Inc. offers transportation service on call and demand as well as on daily schedules maintained between all points served direct, and likewise offers expedited through transportation service from Supreme, Louisiana, and other points beyond its line by connection with other motor common carriers of general commodities at common interchange or terminal points, including Houston.

The Regular Common Carrier Conference of the American Trucking Associations, Inc. with headquarters at Washington, D. C., is a non-profit incorporated association of more than 2,000 duly authorized general commodity common carriers of property by motor vehicle, such as Brown Express, Inc., Central Freight Lines Inc., Texas-Arizona Motor Freight, Inc., and Red Ball Motor Freight, Inc. The members of the Regular Common Carrier Conference comprise a division or Conference of the American Trucking Associations, Inc., a non-profit corporation constituting the national trade association of the trucking industry. The Regular Common Carrier Conference is organized primarily to foster, protect and promote the interests of general commodity common carriers of freight and to advance such interests through cooperation and organization, including protection of the franchised operations of such common carriers from unlawful and unauthorized competition from other for-hire carriers.

The Texas Tank Truck Carriers Association, Inc., with headquarters at Austin, Texas, is a non-profit Texas corporation whose members are irregular route carriers of various types of property, including sugar, by tank and other specialized types of motor vehicles operated in Texas and in numerous other states and areas. The members of the Texas Tank Truck Carriers Association, Inc. who are engaged in such transportation in interstate and foreign [fol. 156] commerce within Texas, Louisiana and elsewhere

operate pursuant to franchises and operating rights duly and lawfully granted to such members by the Interstate Commerce Commission in the form of certificates of public convenience and necessity or in the form of contract carrier permits. The Texas Tank Truck Carriers Association, Inc. is organized primarily to foster, protect and promote the interests of its members through cooperation and organization, including protection of the franchised operations of such members from unlawful and unauthorized competition from other for-hire carriers.

Statute, Rule and Decisions Authorize Intervention

These interveners, in connection with the filing of their Motion For Leave To Intervene, submitted copies of a separate Memorandum Of Authorities in which Article 2323 and Rule 24(b) are quoted in pertinent part and are discussed in connection with some of the many decisions applying such statute and rule, including *S. E. C.* v. *United States Realty and Improvement Co.*, 310 U.S. 434, 60 S.Ct. 1044 (1940); and *Textile Workers Union of America* v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955).

Since the said Memorandum is already before the Court repetition of its contents in this brief is considered unnecessary.

Commission's Order Consistent With Prior Commission Interpretation of Act, With Its Past and Recent Legislative History, and With Objectives of National Transportation Policy

As stated, the content of this brief has been intentionally restricted to a showing of the justiciable interest of interveners. As conceived by interveners, however, such a showing inevitably requires consideration by the Court of the nature and purposes of the economic regulation of for-hire carriers to which interveners are subject and from which plaintiffs claim exemption in their westbound handling of sugar.

[fol. 169] Secretary's Certificate (omitted in printing).

[fol. 170]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Division 1, Washington, D. C.

No. MC-C-2055

NOV 21 1956

EMMA SHANNON AND RICHARD J. SHANNON, DOING BUSINESS AS E. AND R. SHANNON, AND J. T. WILCOX, DOING BUSINESS AS WILCOX BROKERAGE COMPANY— INVESTIGATION OF OPERATIONS

ORDER—November 5, 1956

It appearing, That there is reason to believe that Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon of San Antonio, Texas, have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act;

It further appearing, That there is not in force a certificate of public convenience and necessity or permit issued by this Commission authorizing said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, to engage in operations as a common or contract carrier;

It further appearing, That J. T. Wilcox, doing business as Wilcox Brokerage Company, of San Antonio, Texas, may have participated in and aided, abetted, counseled, induced and procured the said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, in the transportation aforesaid, and thereby is a party interested in such transportation, and also may have been and is engaging in the practice of a broker of such transportation without a broker's license issued by the Commission authorizing him to engage in such transactions, in violation of Section 211, and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby instituted under Section 204(c) of said Act, into and con-

cerning the motor carrier operations of said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, with a view to determining whether they have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206(a)(1) or 209(a)(1) of said Act, and into the practices of said J. T. Wilcox, doing business as Wilcox Brokerage Company, with a view of determining whether he has been and is engaging in transactions as a broker of such transportation, in violation of Section 211 of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant;

It is further ordered, That said Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, 1716 S. San Marcos Street, San Antonio, Texas, and J. T. Wilcox, doing business as Wilcox Brokerage Company 136 Shadwell Drive, San Antonio, Texas, be, and they are hereby made respondents in this proceeding;

It is further ordered, That this proceeding be set for hearing at a time and place to be fixed;

[fol. 171] It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular operations alleged to have been performed in violation of said Sections 206(a)(1), 209(a)(1), and 211 of said Act;

And it is further ordered, That a copy of this order be served upon said respondents and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 1.

Harold D. McCoy, Secretary.

(SEAL)

[fol. 172]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-C-2055

EMMA SHANNON and RICHARD J. SHANNON, DBA E. AND R. SHANNON and J. T. WILCOX, DBA WILCOX BROKERAGE COMPANY—INVESTIGATION OF OPERATIONS

ORDER—February 12, 1957

Present: Everett Hutchinson, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That by order of November 5, 1956, the Commission, Division 1, instituted the above-entitled proceeding which is one which the Commission is required by the Interstate Commerce Act to refer to a joint board;

And it further appearing, That the joint board named below is the proper board to which said matter should be referred;

It is ordered, That the above-entitled matter be, and it is hereby, referred to Joint Board No. 32 for hearing on the 29th day of March A. D. 1957, at 9:30 o'clock a.m. United States Standard Time, at the Hilton Hotel, San Antonio, Tex., and for the recommendation of an appropriate order thereon accompanied by the reasons therefor;

It is further ordered, That in the event the said joint board shall waive action on the matter by a failure of its members to appear at the time and place the hearing is assigned and to participate therein, the above-entitled matter thereupon shall be heard by Examiner Rene J. Mittelbronn, who shall recommend an appropriate order accompanied by the reasons therefor.

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Interstate Commerce Commission, Washington, D. C., to that effect by notice which must reach the Commission within ten days from the date of service

hereof, and that the date of mailing of this order shall be considered as the time when the order is served.

Dated at Washington, D. C., this 12th day of February, A. D. 1957.

By the Commission, Commissioner Hutchinson.

Harold D. McCoy, Secretary.

(SEAL)

[fol. 174]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

In the Matter of

EMMA SHANNON and RICHARD J. SHANNON, DBA E. AND R. SHANNON and J. T. WILCOX, DBA WILCOX BROKERAGE COMPANY—INVESTIGATION OF OPERATIONS

Transcript of Hearing

Parlor "F", Hilton Hotel,
San Antonio, Texas,
Friday, March 29, 1957.

Met, pursuant to notice, at 9:30 a.m.

Before:

Rene J. Mittelbronn, Examiner.

APPEARANCES:

William W. Guild, 812 Texas and Pacific Building, Fort Worth, Texas, appearing for the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Walter C. Wolff, Sr., and Walter C. Wolff, Jr., James K. Building, 417 South Main, San Antonio, Texas, appearing for the respondents.

[fol. 176] PROCEEDINGS

Exam. Mittelbronn: Come to order, please.

The Interstate Commerce Commission has set for hearing at this time and place Docket MC-C-2055.

Under the Commission's Order this proceeding is designed to institute an investigation to determine the operations of Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon and J. T. Wilcox, doing business as Wilcox Brokerage Company.

More specific purpose of the investigation is to determine whether or not the particular operations just described are in any way violative of the Interstate Commerce Act.

Are the parties ready to proceed? Who appears for the respondents?

Mr. Wolff, Jr.: Walter Wolff, Senior, my father, and Walter Wolff, Jr., Attorneys for both Mr. Wilcox and Mr. Shannon.

Exam. Mittelbronn: Are you gentlemen admitted to practice before the Commission?

Mr. Wolff, Jr.: I don't believe I am.

Mr. Wolff, Sr,: I am.

Exam. Mittelbronn: You are, sir?

Mr. Wolff, Sr.: Yes.

Exam. Mittelbronn: All right.

Off the record.

(Discussion off the record.)

[fol. 177] Exam. Mittelbronn: On the record.

In the discussion that just occurred off the record it was ascertained that the senior partner of the firm representing respondents in this proceeding has already taken the initial steps to become a registered practitioner with the Commission.

Any other parties appearing in behalf of respondents?

(No response.)

Exam. Mittelbronn: Representatives for the—

Mr. Guild: William W. Guild, I am an attorney for the Bureau of Inquiry and Compliance of the Interstate Commerce Commission.

Exam. Mittelbronn: Are you ready to proceed, Mr. Wolff?

Mr. Wolff, Jr.: Yes, sir.

Mr. Guild: As I understand it, the Bureau of Inquiry and Compliance will be the initial proceeder in this case.

Exam. Mittelbronn: Yes.

Mr. Guild: And at this time I should like to say that we had had a subpoena issued for the production of certain documents. However, due to the inconvenience that it might cause Mr. Shannon to have those documents introduced as exhibits, the attorneys for the respondents and myself have agreed to the stipulation for the introduction of an exhibit which sets out the pertinent facts of those documents in lieu of that subpoena, so we would not file that subpoena at this time.

[fol. 178] Exam. Mittelbronn: Does the subpoena direct within its contents how it shall be returned?

Mr. Guild: No, it does not.

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record. Proceed.

So the record will be complete in the discussion just occurred off the record the attention of the respondents was called to rule 56, subparagraph (d) of the Commission's General Rules of practice, and they were advised that they could proceed in introducing documents according to said rule. The parties, however, reached an agreement which will now be stated by counsel Guild.

STIPULATION OF PARTIES AS TO INTRODUCTION OF EXHIBITS

Mr. Guild: The attorneys for the respondents and attorney for the Bureau of Inquiry and Compliance agree and stipulate to the introduction of Exhibit No. 1, which is a list of 15 shipments showing the invoice from J. Aron to E. and R. Shannon, which shows the cost of the sugar to E. and R. Shannon less two per cent discount, a dray receipt number, consecutively in the exhibit, which shows the date the sugar was received by E. and R. Shannon from J. Aron Company at Supreme, Louisiana, the respective sales slips on the sugar so purchased, which reflect the sale which E. and R. Shannon made of the sugar at San Antonio to the ultimate consumer and the date on which the sale took place, and the [fol. 179] resale price received by E. and R. Shannon.

It also contains a column showing the difference in price between what E. and R. Shannon paid for the sugar and what they received in the sale of said sugar.

It further contains a column showing the net profit in cents per 100 pounds of sugar realized by E. and R. Shannon from the sale of said sugar.

Mr. Wolff, Jr.: I might add one thing to that.

Let the record show that it was mentioned that the cost price was less two per cent discount, and that the resale price delivered in San Antonio also contains the same discount figure. Let the record further show that the respondent is merely stipulating that the figures contained on this exhibit are the same figures that are contained in the original instruments, and are not admitting that any of the figures or instruments are material in this particular hearing going to the question of whether or not the parties are a carrier required to be licensed.

On the contrary we urge our objection either at this time or at the proper time when they are going to be actually admitted into evidence that they are irrelevant.

Mr. Guild: Well, the Bureau at this time offers that Exhibit No. 1 into evidence subject to the parties' objection that they are not material.

Mr. Wolff, Jr.: Let the record reflect that when counsel [fol. 180] offered the instruments that the respondent objects to same because they are irrelevant to any issue in this case, and merely show several isolated sales of the parties and purchases by the respondents, and the net results of same as setting out a certain figure of profit has nothing to do with the particular hearing in the determination of whether or not either of the respondents is in the trucking business.

The rail rates and trucking rates are complete disassociated from the particular figures that are shown in the last column as the profit, but instead the profit that is contained in the last column is the average profit that a sugar merchant makes in his sales in this locality, and the rate, trucking rate, has nothing to do with it, and for that reason we believe that the exhibit is completely immaterial.

Mr. Guild: Are you ready to proceed?

Exam. Mittelbronn: No. I am going to rule.

The Examiner rules that the document introduced and offered into evidence, which will hereby be identified or designated as Exhibit No. 1, that said objection goes to an element of the merits, if any, to this entire proceeding, and the objection made by counsel in that light goes to the weight, if any, that might be attributed to this document.

(Commission's Exhibit No. 1, Counsel Guild, was marked for identification.)

Exam. Mittelbronn: Under these circumstances it is re-
[fol. 181] ceived in evidence and the objection is overruled.

(Commission's Exhibit No. 1, Counsel Guild, was received in evidence.)

Mr. Wolff, Jr.: May I inquire, under the rules, sir, I don't believe it's necessary for us to make exceptions to any of your rulings?

Exam. Mittelbronn: Exceptions are automatic, yes.

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: Raise them, however, on brief. Otherwise they will be considered waived.

Mr. Guild: I would like to have an exhibit marked for identification as Exhibit No. 2. You want me to identify it?

Exam. Mittelbronn: Describe it, yes.

Do the parties have a copy?

Mr. Guild: Yes. About these tariffs.

Mr. Wolff, Jr.: Yes.

Mr. Guild: An exhibit showing rail rates in carload and less carload quantities on sugar, beet or cane, between Supreme, Louisiana and San Antonio, Texas, effective May 15, 1956 through August 30, 1956.

Exam. Mittelbronn: The exhibit just described and the rates referred to are rail rates.

(Commission's Exhibit No. 2, Counsel Guild, was marked for identification.)

Mr. Guild: The parties have stipulated to the introduction of that exhibit.

[fol. 182] Exam. Mittelbronn: It is stipulated that the tariff authority shown on this document is correct in every way?

Mr. Wolff, Jr.: Yes, sir. We stipulate that the tariffs as contained on that instrument, being the rail rates from Supreme, Louisiana to San Antonio, Texas, those in both carload lots and less than carload lots, are the correct tariffs but, of course, urge the same objection that we urged to the introduction of the first exhibit, in that this is a document that attempts to connect up the rates with the net profit, and by the same objection we urge that the rates not be introduced into evidence because they are completely irrelevant and show no correlation whatsoever between the net profit and the rates, and further that the rates, themselves, are immaterial and irrelevant to the question before the Examiner.

Exam. Mittelbronn: All right.

Rates as contained in tariffs published with the Interstate Commerce Commission, those tariffs are and have the effect of a federal statute by law. Such being the case without any such document as this, rates in tariffs are taken official notice of by this agency and by the Federal Courts, and judicial notice is taken of them.

In that light the document just described will be identified as Exhibit No. 2 and received in evidence.

(Commission's Exhibit No. 2, Counsel Guild, was received in evidence.)

[fol. 183] Mr. Wolff, Jr.: Might I ask a question, sir?

Exam. Mittelbronn: Yes, sir.

Mr. Wolff, Jr.: We, of course, agree that those are the correct rates. Our objection is merely going to the relevancy of them and—

Exam. Mittelbronn: Relevancy and what weight, if any, that this Commission might attribute to them.

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: That is understood.

Mr. Guild: Request to have an exhibit identified as Exhibit No. 3, which shows the regular route common motor carrier rates on sugar, beet or cane, between Supreme, Louisiana and San Antonio, Texas, effective May 15, 1956 through August 30, 1956. We offer that at this time by stipulation of the parties, respondents and the Bureau of Inquiry and Compliance.

(Commission's Exhibit No. 3, Counsel Guild, was marked for identification.)

Exam. Mittelbronn: Unquestionably the same objection is made.

Mr. Wolff, Jr.: Yes, sir, the same objection as to relevancy, but we stipulate those are the correct rates, themselves.

Exam. Mittelbronn: All right. The exhibit just described will be identified as Exhibit No. 3 and received.

(Commission's Exhibit No. 3, Counsel Guild, was received in evidence.)

[fol. 184] Mr. Guild: I would like to call Mr. Whitehead to the stand.

Exam. Mittelbronn: Just a moment.

Off the record.

(Discussion off the record.)

Exam. Mittelbronn: Proceed, sir.

Mr. Guild: Mr. Whitehead.

LEON J. WHITEHEAD was sworn and testified as follows:

Direct examination.

By Mr. Guild:

Q. State your name and where you reside.

A. Leon J. Whitehead. My address is 576 U. S. Post Office and Federal Building, San Antonio.

Q. For whom do you work, Mr. Whitehead?

A. Interstate Commerce Commission, Bureau of Motor Carriers.

Q. For how long have you worked for them?

A. I have been employed by the Bureau of Motor Carriers, Interstate Commerce Commission, since 1938, except for a short period in '53, '54 and half of '55 when I was employed as Director of Compliance and Safety for Strickland Transportation Company at Dallas, Texas. I resumed employment with the Commission on last June 1.

Q. What are your duties briefly?

A. I am District Supervisor with headquarters at San Antonio, Texas, charged with the administration of Part 2

of the Interstate Commerce Act, the rules and regulations [fol. 185] promulgated by the Commission, in the 71 counties, South Texas, territory, which entails the administration over all portions of regulation relating to Motor Carriers, and includes the investigations of carriers' records in many respects, including the allegations of unlawful operations, unlawful practices.

Q. Did you investigate E. and R. Shannon's operations?

A. I did.

Q. Pursuant to that investigation did you examine any documents in their business records?

A. I did.

Q. Were those the documents that are listed on Exhibit 1 heretofore introduced into evidence?

A. Those are the documents.

Q. Would you explain your investigation as it related to the examination of those documents?

A. The first inquiry of Mr. Shannon was made in August, at which time his bookkeeper was not present, and he requested that I return at a later date, and I went back, I think, on September 19, 19 or 20, at which time the documents were produced and examination of those documents was made and pencil notes of the content of the documents and identity of the documents was made at that time.

I was presented with a folder, an ordinary manila folder, containing the information I desired.

However, desiring to extend my investigation over a [fol. 186] little broader period I requested the prior file of the same nature and it was furnished, and I took notes from a representative number of the transactions contained in those files, limiting my investigation to the greatest period possible, that is, in extent of time, and attempted to obtain a representative picture of the transportation of sugar by motor vehicle.

Exam. Mittelbronn: Exactly what facts gave rise to this examination of the books of respondents?

The Witness: Mr. Examiner, do you mean in what manner was I assigned to this job?

Exam. Mittelbronn: Well, that might be the answer.

The Witness: I was assigned to this job by my superior, Mr. R. K. Hagerty, District Director at Fort Worth, Texas.

Exam. Mittelbronn: You have no knowledge of the facts, whether complaint by some other carrier or was the audit of the respondents' books a measure of routine investigation or what?

The Witness: I would say routine, Mr. Examiner. I was assigned to the chore by my superior and, of course, I had no alternative but to complete the investigation in that manner.

Exam. Mittelbronn: Proceed.

By Mr. Guild:

Q. In connection with the Examiner's question you just recently took over the San Antonio office?

A. June 1, 1956.

Q. And did you state the date on which you commenced [fol. 187] this investigation approximately?

A. That is a matter of memory. I think about September 19 or 20.

Q. In 1956?

A. 1956.

Q. Now, from your examination of those documents the dates listed under the invoice number on sheet 1 of Exhibit 1, that would be 5-14-56?

A. 5-16-56. All of these transactions occurred and were completed in 1956.

Q. And what is the dray receipt?

A. The dray receipt is represented to me as a document executed by the J. Aron Company sugar refinery at Supreme, Louisiana at the time the truck appeared to load sugar, and shows the quantity of sugar loaded, the time the truck came in, the time it went out, the truck license number, and the driver's name, as I recall.

Q. Whose truck?

A. The truck of E. and R. Shannon, San Antonio.

Q. Now, what are the sales slips?

A. The sales slips were represented to me as a document executed in the offices of E. and R. Shannon in San Antonio relating the information to the consignee of the sugar, the quantity and kind of the sugar, and the price which it was delivered to them.

[fol. 188] Q. Now, I notice on this exhibit the consignee, the last name is given, like Lawler, Judson, Knowlton, Barq's, and Guerra appear. Could you give us the full name on those and who they are?

A. I believe I can give you the full names. Lawler relates to H. T. Lawler, a wholesale grocery in San Antonio. Judson is the Judson Candy Company. Knowlton is a dairy. Barq's is a bottling company. Guerra, at the bottom, is a wholesale grocer in Laredo.

Q. During your investigation of this respondent did Mr. Shannon explain the modus operandi of his handling of the sugar?

A. Well, Mr. Shannon in connection with Mr. Wilcox, and I had some conversations concerning—

Exam. Mittelbronn: It will be understood that the testimony now being given is your opinion of the conversation of these gentlemen inasmuch as apparently they are not here.

Mr. Guild: Yes sir, they are.

Mr. Wolff, Jr.: Yes, sir, they are here.

Exam. Mittelbronn: They are here?

Mr. Guild: Those are the respondents, both of them.

Exam. Mittelbronn: It will be understood as your understanding of the conversation unless otherwise contradicted. Proceed.

A. We had several conversations concerning this inas-
[fol. 189] much as it's always my intent to obtain as much information surrounding these matters as is possible to possibly limit the investigation or eliminate the investigation, or to proceed with the investigation.

My conversations indicated to me, and it's my understanding, that Mr. Shannon, who is the operating manager of E. and R. Shannon, is in the business of buying and selling livestock, feedstuffs, salt and is a rather large operator in that respect, and in that connection he operates some trucks, and makes a practice of loading those trucks, for example, to Southern Louisiana or in that vicinity, unloads them and returns with this sugar, and on occasion will send an empty truck over to load sugar and bring it back to San Antonio.

Mr. Shannon very vehemently declares that this is a legitimate business of his, that he is in the sugar business. Investigation was prompted, of course, to determine in my mind whether the haul is for hire compensation or subject to Part 2 of the Interstate Commerce Act, or whether Mr. Shannon is a private carrier, exempt from all provisions of the Act except the motor carrier safety regulations.

My discussions indicated to me that there was a large area of doubt as to the legality of those operations.

By Mr. Guild:

Q. Well, did Mr. Shannon explain his handling of the sugar? That was the first question. That is, in the transportation and delivery of same.

[fol. 190] A. The mechanics of the loading and transportation, unloading of the trucks, was explained as one wherein the sugar is ordinarily loaded at the refinery and unloaded at the place of business of the consignee. However, on some occasions some lots of sugar are unloaded into a warehouse and placed in inventory, from which small lots are sold, and I believe the figure at that time given me was from 1 to 25 bags to small purchasers.

Q. That would mean that the bulk of the sugar was delivered direct to the consignee?

A. To a consignee, that is my understanding.

Q. From the truck?

A. That is my understanding.

Q. Will you explain why that in his operations he felt that it was necessary to deliver it direct to the consignee from the truck?

A. Yes. Mr. Shannon and Mr. Wilcox and I discussed that feature, and I am of the understanding that their margin of profit in the sugar transactions is rather narrow, and the cost of unloading that sugar into storage and reloading it is rather large in comparison with the profit margin, and that in every instance possible they take advantage of the saving and deliver the sugar directly to the consignees.

Q. Did Mr. Shannon discuss the warehousing practices of his company with respect to the sugar?

[fol. 191] A. Mr. Shannon constantly insisted that he did warehouse sugar in the sense that they would load several hundred pounds on a truck coming back particularly for inventory, but no great amount of sugar was attempted to be kept in the inventory. However, it was indicated to me that some quantity of sugar was usually in the warehouse.

Q. Was there a discussion as to the relationship between Mr. Wilcox and the Shannon business?

A. Yes, Mr. Wilcox answered my inquiry on that score. He stated that he was a broker. I believe he referred to himself as a manufacturer's representative generally, and a broker as to sugar for J. Aron and Company, and that Shannon is his distributor, that he buys the sugar and Shannon was his distributor.

Q. Mr. Whitehead, do you know approximately what it costs to operate a motor vehicle by common motor carrier?

A. I have some knowledge along that line, yes.

Q. What does it cost per mile?

A. Regular route common carriers, motor carriers, of general commodities construe that their cost of operation approximates very closely to 50 cents per mile.

Q. Do you know how many miles it is from San Antonio to Supreme, Louisiana?

A. Approximately 525.

Mr. Wolff, Jr.: Your Honor, we would like to object to [fol. 192] the answers to the last two questions and ask that they be stricken because from the answers, themselves, Mr. Whitehead has stated that they are based on hearsay and not upon his knowledge. Persons have stated to him what they were.

Exam. Mittelbronn: Objection sustained. Qualify the witness if you wish to elicit this type information.

By Mr. Guild:

Q. Do you know approximately what the costs are in operating a motor vehicle by common motor carrier? Do you know, yes or no?

A. Counsel, you have asked a question that no one could answer factually. The costs vary considerably. There is an

established basis for determining costs in arriving at rates and arriving at whether traffic is profitable or whether it isn't. Those bases are generally accepted by the industry, and in my experience with Strickland Transportation Company it was one part of my duty to be familiar with that area of knowledge.

However, so far as a factual answer is concerned I doubt that any individual in the United States could give you a cost of operation per mile for any truck that is operated.

Q. But you say that the industry then accepts approximately 50 cents per mile as a cost basis for operating their vehicles?

A. That is their point of departure.

Mr. Wolff, Jr.: We want to object to that question as [fol. 193] being leading and also hearsay.

Exam. Mittelbronn: Objection sustained. I haven't met one segment of the motor carrier industry that accepts anything in any part of the entire country which can be applied on a general basis, or even an individual basis, outside of their own.

Does counsel have any cost statistics based on recognized cost formulas for the particular area, if not the particular state within which respondent is operating?

By Mr. Guild:

Q. Mr. Whitehead, have you ever had the opportunity to supervise or compile, yourself, a statistical basis for costs of operating motor vehicles in this state?

A. I have never compiled, no sir, I have never compiled that information personally.

Q. Did Mr. Shannon represent who his principal purchasers of sugar were?

A. Yes.

Q. Who were they?

A. Mr. Shannon was very particular that the purchase and sale of sugar was not limited to the individuals or the companies listed on our Exhibit No. 1. However, he did indicate to me that they were his principal consignees or purchasers.

Mr. Guild: I believe that is all. Pass the witness.
Exam. Mittelbronn: Cross-examination.
Mr. Wolff, Jr.: Yes, sir.

[fol. 194] Cross examination

By Mr. Wolff, Jr.:

Q. Mr. Whitehead, in line with the question that the Examiner asked a little while ago, do you know whether or not Mr. Shannon received a communication from the Commission about two years ago along the same line and was thence investigated or at least was inquired of him of his operation?

A. Yes, I have the files of my predecessor in office here maintained at that time, yes, I have those files.

Q. And then at that time no action was taken. Do you know whether or not, sir, do the files reflect whether or not his operation is exactly the same or was exactly the same then as it is or it was when you investigated him?

A. There was very little inquiry made into the operations of Shannon at the time. I don't believe that any of the office records or documents were checked or any determination was made. I do know that inquiry was opened up and that is all I know.

Q. I see.

Now, to clear up one point, Mr. Whitehead, this word, consignee, has been used several times. It's on that instrument that has been introduced into evidence, and it lists several names, Lawler, et cetera.

Now, when the sugar is billed out at J. Aron and Company, that is the seller in Louisiana, it's billed out by the [fol. 195] dray receipt always to Mr. Shannon?

A. Always to Mr. Shannon.

Q. So when this word, consignee is used that is the purchaser of the sugar from Shannon as per the records?

A. That is correct.

Q. I mean that is what is meant by the word, consignee?

A. That is the fact, yes.

Exam. Mittelbronn: Is the term, consignee, contained in that invoice, the billing?

Wolff, Jr.: No sir, I don't see it.
have them all there (indicating).
Guild: I don't believe it is.
am. Mittelbronn: Where was the term obtained to in-
it in this exhibit, then?
Wolff, Sr.: I think the government's attorney used

e Witness: I think Mr. Whitehead used it, to be fac-
Mr. Wolff. It's probably in error on my part.
am. Mittelbronn: Do I hear an objection?
Wolff, Jr.: We ask that that part be stricken or if
eft that it be left with the understanding, with Mr.
head's own determination of what the word meant,
t had no particular legal significance and that the facts
levelop what they are.
am. Mittelbronn: All right.

By Mr. Wolff, Jr.:

Mr. Whitehead, are you familiar with the sugar busi-
itself, or you learned something about it at least in
196] your investigation?
I have learned in these investigations that it's a
r complicated, fast-moving business. That is about all.
That is what I meant, the fast-moving part of it.
other words, sugar is something that has to be turned
pretty quickly or something that can happen to the
r, either get wet or damp and consequently lose its
e.
I have learned this, that sugar is a more highly per-
ble commodity than I had ever assumed that it is. Very
icular warehousing must be supplied to properly ware-
e sugar to keep it from contamination and dampness,
it's a highly organized business. Now, beyond that I
t know much about the sugar market.
And have you also learned, sir, that everybody con-
ed with the business works on a very small margin of
it? I mean 30 or 40 cents.
No, I don't know as to that.
It's possible; you just don't know?
I don't know.

Q. But when you say it's a fast-moving business you mean that it's necessary to buy it and sell it quickly if you want to stay in the business insofar as you have—

A. No, no, I don't mean that. I mean that the price fluctuations—I am led to believe that price fluctuations are quick and drastic in some instances, and if you get caught [fol. 197] with a big inventory of sugar on your hands you might lose some money.

Q. So it's—

A. And competitive sugar people come in and you have to arrange your price schedules and all to meet those things.

Mr. Wilcox very graciously gave me a pretty good run-down on it, but I mean it wasn't particularly pertinent except at the time to try to get to the bottom of this investigation.

Q. I see, sir.

In other words, sugar was different from lumber, wouldn't you say?

A. Well, I don't know as to that.

Q. Well, would you say—

A. It is as far as storage is concerned, certainly.

Q. And a good sugar man would try to keep his products moving as quickly as possible, because of the fact there could be a drastic decline in the market, it's necessary to try to sell the sugar, get it sold as quickly as possible, or there is a chance for a loss?

A. Mr. Wolff, I think that is true of any mercantile enterprise.

Q. But, of course, some things are more perishable than others?

A. I am sure that is true.

Q. Now, I would like to ask you one more question concerning your testimony, Mr. Whitehead, and that is about Mr. Wilcox.

Did I understand you correctly that you said that Mr. [fol. 198] Wilcox said that he was the one buying the sugar and Mr. Shannon was merely distributing it for him?

A. That's right. However, I can elaborate on that somewhat. I discussed the manner in which these orders are received with both these gentlemen, and I was told that Mr. Wilcox, when he is in town he takes orders for this sugar,

and at times Mr. Wilcox is out of town Mr. Shannon takes them, and Mr. Shannon takes them while Mr. Wilcox is in town. It seems like a sort of in and out proposition where either of them. However, Mr. Wilcox, as I understand it, does—is paid a brokerage fee on all of the sugar.

Q. From Aron and Company?

A. From Aron and Company, handled through Shannon.

Q. In other words—

A. At least that is his statement.

Q. If Mr. Wilcox can sell some sugar to Mr. Shannon he gets a commission off of it from Aron?

A. Oh, yes, definitely.

Q. So that would be his interest in trying to get Mr. Shannon to buy sugar; if Mr. Shannon wants to resell it, of course, that is up to him, but Mr. Wilcox gets a monetary consideration from Aron and Company for everything he sells to Shannon?

A. That is at least one interest.

Q. Do you know, in your investigation, looking through all the records, did you ever find any instance of Mr. Wilcox [fol. 199] purchasing sugar, himself, from Aron and Company and reselling it?

A. You mean without the intervention of Shannon?

Q. Well, you said that Mr. Wilcox—

A. I didn't investigate any records of Mr. Wilcox. I only investigated the records of Mr. Shannon.

Q. And they all reflected that Mr. Shannon purchases sugar from Aron and Company?

A. Yes.

Q. Did you determine whether or not Mr. Shannon in his business buys and sells other commodities, such as grain, salt, sugar, cattle?

A. I have already so testified.

Q. Molasses and others?

A. I don't know anything about molasses. I found plenty of evidence of livestock, feedstuffs and salt, which is all aligned with the feed business, of course.

Q. Did you investigate Mr. Shannon's records to determine the value of his trucking equipment as opposed to the value of other equipment in the business? In other

words, is his whole value tied up in his trucks or is it not just a small percentage of the value of his fixed assets?

A. From my observation, I went by the warehouse one time, and the gentleman in charge was not there so I did not invade the premises. However, I did look in the front [fol. 200] door, and there were several thousand pounds of feedstuffs stored in that warehouse.

Mr. Shannon was extremely active while I was in his office in the purchase and sale of livestock. I don't know anything about his assets.

Q. I see.

A. I am satisfied in my own mind that his general business and his primary business is that as a livestock dealer and shipper and a livestock feedstuffs dealer.

Q. But as you said you have already testified that he does buy and sell other items?

A. Oh, yes, yes, extensively, I would say.

Q. And you don't know what the relationship of his trucking equipment bears to the total value of the assets of his business?

A. Oh, no, no.

Q. Nor do you know what relationship the salaries he might pay his truckers, the ones that actually drive the trucks, bear to the total salary of the total payroll?

A. I have no knowledge of the total number of employees Mr. Shannon has. I just don't know.

Mr. Wolff, Jr.: I believe that is all, sir.

The Witness: Thank you.

Exam. Mittelbronn: Maybe the record is clear but I am not. I understand on this Exhibit No. 1, identified as [fol. 201] Exhibit No. 1, that the first item shown on page 1 thereof is supposed to be the same quantity of sugar that is shown in item 1 of page two?

Mr. Guild: Yes, sir.

The Witness: Mr. Examiner, if these sheets are laid down side by side and the invoice number 1683 on the first line of the left hand page is related to sales slip number 1262 on the second page, that single line across the two sheets constitutes a complete transaction of the purchase, transportation and sale of a single lot of sugar.

Exam. Mittelbronn: All right. Thank you.

Redirect examination.

By Mr. Guild:

Q. Mr. Whitehead, you didn't mean to infer that, when you stated Mr. Shannon was in the business of livestock and feedstuffs, that he was not in the sugar business, transportation of sugar, did you?

A. My observations and investigation of Mr. Shannon's operations related particularly to the transportation of sugar, in which I was interested.

Q. But that was—

A. Mr. Shannon was certified by our Commission years ago as a private carrier of livestock and is so registered with our Commission at this time, and is engaged in that business at this time.

While there I determined to my own satisfaction that he is a rather extensive dealer in livestock feedstuffs and salt, [fol. 202] such commodities—

Q. That's as opposed to sugar or the transportation of sugar, the handling of sugar?

Mr. Wolff, Sr.: Now, that is certainly leading, Mr. Examiner, and another thing—

Exam. Mittelbronn: Objection sustained. Proceed. Make the questions more specific and direct without leading, counsel.

Mr. Guild: That is all.

Mr. Wolff, Jr.: One more thing, Mr. Whitehead.

Exam. Mittelbronn: Further cross.

Recross examination.

By Mr. Wolff, Jr.:

Q. At the time that you were there didn't Mr. Shannon have on hand about five hundred sacks of sugar, more than a carload, in his inventory?

A. Mr. Wolff, I never could pin that down. I asked Mr. Shannon's permission to see his warehouse, and I went over there and the warehouseman was not there. I don't know. I never saw sugar in the warehouse personally so I

don't know. I had to get some information from Mr. Shannon as to what sort of an inventory was carried, and the most information I could elicit was the fact that they sold from one to twenty-five bags to small customers at a time.

Q. Didn't Mr. Shannon show you the records of the inventory that he had on hand, show you a receipt for so many bags, five hundred bags, approximately?

[fol. 203] A. There was one instance wherein sugar was warehoused, and I think my memory may be wrong as to the name of the warehouse, I think it was the Security Bonded Warehouse, where I believe an entire truckload of sugar was warehoused.

Q. Did at that time, didn't you all have a discussion along this line, that he had run out of space in his own warehouse to even store the sugar, and he had to put some of this sugar some place else?

A. The discussion followed this trend: The truckload of sugar was stored in this public warehouse and I think it was Security Bonded. The cost of the storage was 12 cents a hundred pounds. Now, Mr. Shannon told me that with his small margin in the sugar transactions that he simply couldn't afford commercial storage space, and that he represented to me never occurred between the time that was stored and the time of my investigation. There was one truckload stored in Security Bonded Warehouse to my knowledge.

Q. He told you he couldn't afford to make any profit on it by doing that and he would have to try to find space in his place or try to get it sold fast?

A. Well, he told me he couldn't afford to get it stored in commercial storage because of that.

Mr. Wolf, Jr.: That is all.

Mr. Guild: I would like to show in the record the rail and motor carrier rates by making a statement in the record [fol. 204] from Exhibits 2 and 3 at this time, if I may.

Exam. Mittelbronn: Well, Exhibits 2 and 3 are already in the record.

Mr. Guild: Yes, I would just like to put it in the transcript, recite out from the Exhibits what the actual rates are by rail and by motor carrier.

Exam. Mittelbronn: Proceed.

Just a moment. Finished with this witness, everyone?

Mr. Wolff, Jr.: Yes.

Exam. Mittelbronn: Thank you, Mr. Whitehead. You are excused.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Guild: From Exhibit 2 showing the rail rates in carload lots from Supreme to San Antonio, they are 69 cents per hundred pounds. In less than carload lots $1.38 per hundred pounds.

From Exhibit 3 the motor carrier rates, the transportation of sugar from Supreme to San Antonio in less than truckload lots is $1.70 per hundred pounds and the rate in truckload lots is $1.09 per hundred pounds.

May I go off the record for a moment?

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.

[fol. 205] Mr. Guild: I wanted to state for the record that respondent, E. and R. Shannon, is a partnership composed of Emma Shannon and Richard J. Shannon, and respondent, J. T. Wilcox, is an individual doing business as Wilcox Brokerage Company.

May I have just a moment?

Exam. Mittelbronn: Partnership formed under the state laws of Texas?

Mr. Wolff, Sr.: Yes, sir.

Mr. Wolff, Jr.: Yes, sir.

Mr. Guild: We rest.

Exam. Mittelbronn: You have completed your case?

Mr. Guild: Yes, sir.

Exam. Mittelbronn: Five minute recess.

(Short recess.)

Exam. Mittelbronn: Respondents ready to proceed?

Mr. Wolff, Jr.: Yes, sir.

Mrs. Masar, will you come over here and take the stand, please?

MARTHA MASAR was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Will you state your name, please?
A. Martha Masar.
Q. Where do you live?
A. Number 2 Pearl Court.
[fol. 206] Q. Here in San Antonio?
A. San Antonio.
Q. What is your business or profession?
A. Bookkeeper.
Q. For whom do you work?
A. For E. and R. Shannon.
Q. How long have you been working for Shannon?
A. Be nine years this June.
Q. Are you familiar, then, with the books and records of the organization?
A. Yes sir, I would say that I am.
Q. Are you familiar with the sugar phase of the business of E. and R. Shannon?
A. Well, in the way of bookkeeping, yes sir.
Q. Do you know anything about any inventories of sugar?
A. Yes, sir.

Mr. Wolff, Jr.: Should we mark these for identification so they can be used by her to refresh her memory?

Exam. Mittelbronn: Perfectly all right. Are they going to be submitted?

Mr. Wolff, Jr.: I don't know whether we want to or not. We could submit them but they would burden the record because the sugar part of it is just part of the inventory as a whole. They are all attached.

Exam. Mittelbronn: Well, you can describe—
[fol. 207] Mr. Wolff, Sr.: They are the records kept by the witness.

Exam. Mittelbronn: Yes.

Mr. Wolff, Sr.: Prepared by the witness.

Exam. Mittelbronn: You can hand her the document or set of documents one at a time, as you wish, and in hand-

ing them to her describe it as such and such a record, certain date, and from that she can testify.

Mr. Wolff, Jr.: All right.

By Mr. Wolff, Jr.:

Q. Mrs. Masar, I show you an instrument purporting to be an inventory taken on the 30th of November 1956 entitled at the top West Compress and Company, and ask whether or not you have ever seen that instrument before?

A. Yes sir, I have.

Q. Was that instrument prepared under your authority?

A. Yes, sir.

Q. Would you look through it and see if there is anything on it concerning sugar?

A. Yes sir, there is a sugar inventory showed that I figured.

Q. What does the inventory show?

A. A hundred bags on hand.

Q. Now, I show you other instruments, 31st of December 1956, 31st of January 1957, the 28th of February 1957, and all of them purport to be inventories of the E. and R. Shannon; and ask whether or not on each of those instruments do you see anything concerning sugar? First, were [fol. 208] all those instruments prepared under your supervision and direction?

A. Yes, sir.

This one shows one hundred twenty-three bags which—

Mr. Guild: Would you relate that date?

Exam. Mittelbronn: What is the date of the inventory on that?

The Witness: December 31, 1956.

Exam. Mittelbronn: One hundred fifty-three bags?

Mr. Guild: One hundred twenty-three?

The Witness: One hundred twenty-three. Would you like the money also?

By Mr. Wolff, Jr.:

Q. What is the next one that you have there?

A. January 31, 1957.

Q. What was that inventory? Does it show anything about sugar?

A. Yes sir, that shows 209 bags.

Q. Do you have any other records before you that would show anything about sugar on any other date?

A. On February 28.

Q. What does that show concerning sugar, if anything?

A. That shows 517.

Q. Now, how often at present do you take an inventory of sugar at E. and R. Shannon?

A. At the end of each month.

[fol. 209] Q. Prior to November of 1956 how often did you take an inventory of sugar?

A. Once every, I think it was four months, six months, something.

Q. Do you remember the occasion when Mr. Whitehead came to the place to investigate for the Interstate Commerce Commission?

A. Yes sir, I do.

Q. At that time are you familiar with the inventory of sugar that you had on hand at that time?

A. Yes, sir. I don't know the exact number but I do know approximately.

Q. You know approximately how much was on hand at that time. Had shortly prior thereto there had been an inventory taken of sugar?

A. That I don't recall. I don't know the exact days.

Q. How do you know approximately how much sugar that you had on hand at that time?

A. Off the records. I had a storage record at that time in a bonded warehouse and then some on hand.

Q. You had some in a warehouse?

A. Yes, sir.

Q. And also some on hand at your own warehouse, Shannon's warehouse?

A. That's right.

Q. All right.

[fol. 210] What was that figure, how much sugar was on hand at that time?

A. To the best of my knowledge it was 400 and something.

Q. Something over 400 bags of sugar?

A. I don't know for sure, sir.

Q. Do you know why there was some sugar stored at a bonded warehouse?

A. Yes, sir.

Q. Will you tell us, please ma'am?

A. Well, at that time Mr. Shannon didn't have it sold and he had to store it, the way I understood it.

Q. Did you have enough room to store it at your own place?

A. No, sir. I mean, I say I don't think we did. That would be my understanding.

Q. Now, you testified awhile ago, I believe, that you are familiar with the sugar business insofar as your records, your bookkeeping, takes you?

A. That's right.

Q. Does Mr. Shannon, from your knowledge of the records, and your knowledge of his operation of the business, does Mr. Shannon sell sugar to the purchasers that were listed on that exhibit and to others for cash or does he sell on credit?

A. Credit and some cash in some instances.

Q. What would the percentage of cash sales bear in relationship to the credit sales? Would it be about the same [fol. 211] or would it be smaller?

A. Oh, the cash sales would be very small. It's nearly all credit.

Q. I show you some instruments purporting to be what you call—what would you call these, ledger sheets?

A. Ledger sheets.

Q. Ledger sheets, with the name of various persons at the top of same, and I ask you whether or not you have ever seen these instruments before?

A. Yes sir, I have. I did all the posting on them.

Q. Were those instruments prepared under your supervision and control?

A. Yes, sir.

Q. What are those instruments?

A. Well, those are sales that we sold to these customers on credit that I keep a record of, accounts receivable, I would say.

Q. Receivable records?

A. That's what I call them, accounts receivable.

Q. Would you tell us what accounts you have there?

A. The Barq's Bottling Company, Judson's Candy Company, Knowlton's Creamery, H. T. Lawler and Sons. That's all that is here, but there's many others in the current ledger.

Q. You are pointing to a book?

A. These are dead files. I mean filled up sheets.

[fol. 212] Q. I show you another instrument purporting to be a book that has quite a few sheets inside of it, appearing to be similar to the ones that you just testified to, and ask whether or not you have ever seen that instrument or that book before?

A. Yes, sir.

Q. Was that book prepared under your supervision and control?

A. Yes sir, by me.

Q. Would you tell us just what that instrument and that book is?

A. That is my accounts receivable ledger.

Q. Do you have a section in there for sugar purchases?

A. It's for sugar, feedstuffs, salt and all things. It's Barq's Bottling Company, Bohnet's Bakery, Casso Guerra, and then S. Cantu and Sons, and Coca Cola Bottling Company, Colonial Cake Company, Delaware Punch Company, Pete Hodge, Jersey Land Creamery, Judson's Candy Company, Knowlton's Creamery, H. T. Lawler, Sylvester Lenz, W. H. Matthews Company, Metzger's Dairy, James Moore and Company, Polar Ice Cream Company, Pepsi-Cola Bottling Company, Roegelein Provision Company, Royal Crown Bottling Company, Sanchez Candy Company, and Ferd Staffel's, and the State Board of Controls, Purchasing Division, at Austin, Texas.

Exam. Mittelbronn: It's understood that all of those firms or names you have read are located within Texas?

Mr. Wolff, Sr.: All within San Antonio.

[fol. 213] Exam. Mittelbronn: Within San Antonio?

Mr. Wolff, Jr.: Except the one in Austin, I believe.

The Witness: Austin.

Mr. Wolff, Jr.: And there was one in Laredo.

The Witness: Laredo.

Exam. Mittelbronn: They are all in the State of Texas?

The Witness: State of Texas, yes.

By Mr. Wolff, Jr.:

Q. Now, what terms, if any, does Mr. Shannon have for collection of those credit accounts? Does he have any credit terms that he requires payment by a certain time?

A. Yes sir, we try, you know, within ten days, there's a two per cent discount if they pay within ten days.

Q. I see.

Are the goods turned over to them, to those particular persons you named, or companies that you named, without their having to pay the money when the goods are turned over?

A. Yes sir, it's all on credit, all of these are.

Q. Now, I notice—

A. These are not cash sales. These are credit.

Q. All credit sales.

I noticed you said those were dead instruments that you have on the top that you testified to to start with, not in the book, but that you now are thumbing through.

Do you mean that those are some other year?

[fol. 214] A. Full, filled up sheets is what I meant.

Q. Filled up sheets.

Now, what dates do those begin of the filled up sheets? Are they the days prior to May and June of 1956?

A. Oh, yes sir, yes sir. They could go back—well, I would have to look to be sure, but they would be a few years back. Back, I guess, as far as '54.

Q. In other words, this selling on credit is something that's been going over the last two or three years, at least, insofar as those records show and insofar as you remember?

A. Yes, sir.

Q. Do you know, could you tell us how much money you now have in your accounts receivable as being owed by various debtors?

A. Yes, sir.

Q. In San Antonio and those other two that were named in Austin and Laredo for sugar only.

A. Sugar only? Right now it's $10,022.10.

Q. In other words, that is what is owed to Mr. Shannon for credit sales of sugar right now?

A. That's correct.

Q. Back in 1956 was Mr. Shannon still selling on credit?

A. Yes, sir.

Q. Do you remember whether or not he's ever had more money than that tied up in sugar sales?

[fol. 215] A. Oh, yes sir, there was more than that.

Q. Can you give us an approximation or tell us how much and approximately what time in 1956?

A. Well, I do know that at times there has been 20 and 30 thousand.

Q. Are you familiar with what happens in the event that something happens to the sugar either in the warehouse or while Mr. Shannon is bringing it from Louisiana, as to who takes the loss on it?

A. Mr. Shannon does.

Q. Has that happened?

A. Yes, sir.

Q. What do you do with your books when that happens?

A. Well, Mr. Shannon takes the loss. I mean all he can sell is what is left, if it breaks or if it should happen to get down.

Q. Are you familiar with the balance sheet of the company, the E. and R. Shannon Company?

A. Yes sir, to some extent I am.

Q. Do you know what various accounts there are contained in the balance sheet?

A. Yes, sir.

Q. As asset accounts?

A. Yes, sir.

Q. I show you an instrument purporting to be a balance [fol. 216] sheet of E. and R. Shannon, dated the 31st of December 1956, and ask whether or not you have ever seen that instrument before?

A. Yes, sir.

Q. Was that instrument, the accounts on that, taken from the records that are under your supervision and control?

A. Yes, sir.

I notice there is attached to it something that is put
ere by scotch tape, a breakdown of the fixed assets
nts. Will you explain to us why that was put on there?
Well, you asked me for the assets—

am. Mittelbronn: Off the record.

iscussion off the record.)

am. Mittelbronn: On the record.
oceed, please.

By Mr. Wolff, Jr.:

Now, that instrument that you have in your hand, we
discussing that balance sheet that you have in your
, and you were explaining why we added a detail of
ixed assets. Would you—
Well, you asked me for the fixed assets, and I just
d this little sheet and put it up here.
I see. In other words, I asked you—
Because that is a breakdown of the assets.

am. Mittelbronn: One at a time, please.
r. Wolff, Jr.: Excuse me.

By Mr. Wolff, Jr.:

The only thing we were interested in for the purposes
217) of this hearing was the fixed assets, so you added
to the total balance sheet, but have brought the total
nce sheet to give a complete picture of the accounts?
Yes, sir.
Now, what is the fixed assets account, what comprises

The automobiles.
What is the value of the automobiles?
Would you like the book value at this time?
Well, read the book value and the depreciation and the
al value. I mean the cost, whatever—do you use a cost
re?
Cost and depreciation reserve and then my book value.
Book value is all right.
Automobiles, $4,597.01.

Q. Now, are those automobiles used in transporting any commodities?

Mr. Guild: May I have that figure over again, please?
The Witness: $4,597.01.

By Mr. Wolff, Jr.:

Q. And, now, are those automobiles? Those aren't trucks?
A. No, sir.
Q. They are not used to transport any commodities insofar as you know?
A. No, sir.
Q. All right.
[fol. 218] What is the next one?
A. Trucks.

Exam. Mittelbronn: Excuse me. How many automobiles does that represent?
The Witness: That represents four, I would say.
Exam. Mittelbronn: Proceed.
The Witness: Three or four. Three, that's right, three.

By Mr. Wolff, Jr.:

Q. What is the next item?
A. Trucks.
Q. What is the book value of the trucks?
A. $14,176.50.
Q. What is the next item?
A. Office furniture and fixtures.
Q. How much, what is the book value of that?
A. $926.70.
Q. What is the next item?
A. Buildings.
Q. What is the value of that?
A. $9,896.82.
Q. What is the next item?
A. The equipment, mill equipment.
Q. And what is the value of that?
A. That's—excuse me, what figure did I give you, the nine thousand?

Mr. Wolff, Sr.: Yes.

[fol. 219] Exam. Mittelbronn: Yes.

The Witness: That's the mill equipment, I am sorry.

Mr. Wolff, Sr.: And not buildings?

The Witness: And not buildings.

That is the mill equipment figure.

By Mr. Wolff, Jr.:

Q. What is the figure on the buildings?

A. $26,944.49.

Q. Any other assets on there, fixed assets?

A. Yes sir, there is another equipment figure, which is $954.24.

Q. Any other assets?

Exam. Mittelbronn: What does that figure represent?

The Witness: That's also mill equipment.

Exam. Mittelbronn: Mill equipment?

The Witness: Yes, sir.

By Mr. Wolff, Jr.:

Q. Any other fixed assets?

A. Yes sir, there is a cottage figure, which is $1,854.50.

Q. Cottage?

A. Yes, sir.

Q. What is that?

A. That was taken in on a bad debt.

Q. I see.

Any other assets, fixed assets?

A. That is all.

Q. What is the total value now of the fixed assets?

[fol. 220] A. $59,350.26.

Q. Now, how about the current assets, does that balance sheet break down the values of all the inventories?

A. Well, yes, uh-huh, it is a small breakdown.

Q. All right.

Now, what does that show as to the current assets pertaining to inventories, themselves?

A. Well, there was an accounts receivable.

Q. What does the accounts receivable show?

A. $30,277.79.

Q. And I believe you testified earlier of that about ten thousand more or less is sugar, is that correct?

A. Correct.

Q. And I think your ten thousand figure, was that as of now or as of the 31st of December, '56?

A. No, the ten thousand figure was as of now, but I think I can give you that figure as of then.

Q. Well, rather than burden the record is it approximately the same then as it is now, two months ago?

A. I would say in that neighborhood. It could vary.

Q. I see.

Now, how about the total amount of inventory that was on hand, assets of the company?

A. Well, I have it here in two figures.

Q. All right. Give us both figures.

[fol. 221] A. The livestock figure was $3,451.70.

Q. All right.

A. And the other figure of feedstuffs and sacks was $15,339.60. And then the other was $2,675.20.

Now, that included the sugar.

Mr. Guild: What was that figure again?

The Witness: $2,675.20.

By Mr. Wolff, Jr.:

Q. Now, what is the total current assets?

A. $56,459.91.

Q. And of that you say about 30 thousand is accounts receivable, so you have about 26 thousand dollars in actual material, current assets?

A. And cash in the banks.

Q. And cash?

A. Uh-huh.

Q. What is or what figure do you have on cash in the bank there?

A. $4,180.62, and the cash on hand was $535.00.

Q. Now, so that exclusive of accounts receivable you have—did you say there was about $56,000.00 in fixed assets, or 59,000 and something?

A. $59,350.26.

Q. And—

A. There's prepaid expenses also.

Q. And then that would be added to the current assets [fol. 222] figure less the amount of your accounts receivable to get what actual material assets the company had, that, is that right?

A. Come again.

Q. I said you would take the total assets of the company and subtract the accounts receivable and that figure would leave you what the actual material assets the company had?

A. Correct.

Q. Now, that balance sheet is taken as of the 31st of December 1956. From your knowledge of the business would you say that the asset accounts remained fairly constant during the year 1956?

A. Yes, sir.

Q. Would the difference be fluctuation value of the inventory?

A. The inventory and the accounts receivable.

Q. And the depreciation?

A. Yes, sir.

Q. At the end of the year you would take more depreciation so actually at the start of the year your accounts would be valued, your assets would be valued a little more?

A. More, yes.

Q. Now, are those same accounts reasonably constant since the 31st of December up to the present date, the last of March?

A. I would say so.

Q. Are you familiar with the salaries that are paid the [fol. 223] various employees of E. and R. Shannon?

A. Yes, sir.

Q. Can you tell us how much per week the total payroll amounts to?

A. Per week?

Q. Yes.

A. Oh, it would have to be an estimate figure of around $1,100.00 a week.

Q. I see.

Does Mr. Shannon employ people who drive trucks?

A. Yes, sir.

Q. How many truck drivers?

A. Three.

Q. How much are they paid?

A. Three, I will say—well, in all I think there's five truck drivers. There would be five or six in all. Some of them are—we have different truck drivers for the big trucks and small trucks, I would say.

Q. All right.

What would be the total amount they are paid each week, the truck drivers, themselves, that actually haul, or that ride the big trucks, drive the big trucks, that carry the sugar and grain and livestock, whatever it is?

A. Well, it varies, but I would say an average would be about, oh, $240.00.

[fol. 224] Q. Out of the $1,100.00, those are paid to drivers of trucks?

A. That's right.

Mr. Wolff, Jr.: I believe that is all. Thank you.

Exam. Mittelbronn: Cross examination.

Mr. Guild: I would like to cross-examine you.

The Witness: Oh.

Cross examination.

By Mr. Guild:

Q. What credit terms does Mr. Shannon have with J. Aron and Company? What are his credit terms?

A. In what respect do you mean, sir?

Q. In the purchase of sugar.

A. Well, they sell to us and, of course, we pay them. We try to pay them, you know, within ten days.

Q. You have a within ten days clause?

A. Well, no, we have no clause.

Q. Well, I say it's within ten days to get the discount?

A. To get the two per cent discount, that's right.

Q. And that is the same credit arrangement you have with your purchasers of sugar, is that correct?

A. Correct.

Q. May I see your balance sheet a moment?

I notice on this balance sheet of 12-31-56 you have accounts payable, $13,322.79. Is a large portion of that accounts payable to J. Aron and Company?

A. Yes, sir.

[fol. 225] Q. So that actually the accounts payable to J. Aron and Company and the accounts receivable from your purchasers of sugar will more or less be representative, will they not? In other words, if you buy more sugar for the sale to customers, and they have to thereafter pay you within ten days you will have a counterbalance of accounts payable to J. Aron and Company, likewise, is that not correct?

A. No, it varies quite a bit at times.

Q. Well, would you say, for instance, say Mr. Shannon suddenly sold $20,000.00 worth of sugar to Barq's, and he ordered that from J. Aron and Company, and he allows Barq's to pay within ten days, is that correct, for the two per cent discount?

A. That's right.

Q. And he also gets a two per cent discount from J. Aron and Company if he pays within ten days. That large purchase would be reflected in both the accounts payable and in the accounts receivable, would it not?

A. Well, I don't quite understand. I mean—

Q. Well, you understand that having sold the sugar, $20,000.00 worth, to Barq's, it would be on the accounts receivable, $20,000.00 from Barq's.

A. That's right.

Q. And having purchased the sugar on a payment of two per cent discount within ten days from J. Aron and Company, the $20,000.00 worth of purchases from J. Aron and [fol. 226] Company would also show on the accounts payable, would it not?

A. That's right.

Exam. Mittelbronn: Do you have any idea of the $13,322.79 which counsel has read to be the total of your accounts payable as of December 31, '56, approximately what portion of that is represented in accounts payable to J. Aron and Company?

The Witness: You mean—well, in my memory I do not know the figures. I mean exactly.

Exam. Mittelbronn: Approximately do you know within a thousand dollars, if you can.

The Witness: Well, I would say approximately it was about five thousand at that date.

Exam. Mittelbronn: Thank you. Proceed, counsel.

By Mr. Guild:

Q. You are not certain of that, though?

A. I am not certain of it.

Q. And, of course, you wouldn't owe J. Aron and Company as much as Barq's would owe you because you sell it at a higher price, is that correct?

A. That's correct.

Q. In your inventory of sugar if sugar is on the truck and you have purchased the sugar at Supreme, Louisiana, and that sugar is on the truck, you keep that sugar in your inventory until you sell it, is that correct?

A. That's correct.

Q. So sugar in your inventory would include any sugar [fol. 227] in your truck?

A. That's right.

Q. And it does sometimes include sugar in your trucks?

A. Well, it just depends on the date of the purchases when I close out my books.

Q. If on the date of the purchase you have sugar on the truck it would be part of the inventory?

A. That's right.

Q. Now, I have your inventory on 2-28-57. You stated that you had an inventory on that date of 517 bags. What does this 320 bottlers indicate?

Exam. Mittelbronn: 320 what?

By Mr. Guild:

Q. Bags, and it shows to be to bottlers. Would that be to Barq's?

A. No sir, I wouldn't know who that would be to.

Q. That is your handwriting, is it not?

A. Yes sir, but I would say that that was a load of sugar that was, you know, that I had.

Q. That had been on the truck?

A. That was on the truck that was coming in, that was purchased; that I would handle through my books as February, closing out, February 28.

Q. And the bottlers would indicate that you knew who you were going to sell that sugar to, is that right?

A. No, that was the type of sugar.

[fol. 228] Q. I see.

How many square feet would you say are in Shannon's warehouse?

A. I couldn't answer that.

Q. But the majority of the items stored in the warehouse are feedstuffs and items of that sort other than, say, sugar? The sugar would be a small portion, of any sugar that you did store, say a hundred bags?

A. Not always.

Q. Well, let's say a hundred bags. How much space would a hundred bags take up?

Exam. Mittelbronn: If you know.

By Mr. Guild:

Q. If you know.

Exam. Mittelbronn: The lady is qualified as a bookkeeper.

A. I do not know the storage capacity.

By Mr. Guild:

Q. Well, but you have observed the storage of sugar in Mr.—

Exam. Mittelbronn: The question is answered, counsel. She does not know.

By Mr. Guild:

Q. Now, on the balance sheet you show that as current assets an inventory of $2,675.20, which you said includes sugar. What portion of that amount represents the actual sugar, do you know?

A. Offhand I don't know. I would have to look on the invenfory sheet to tell.

[fol. 229]. Q. But what are the items that that would include in your inventory, in that item? You have inventory miscellaneous. What other items would that include?

A. That could include the gas pump, the gasoline on hand, and, well, it shows on the schedule there. I don't know exactly. I mean I couldn't tell you the exact figure.

Exam. Mittelbronn: Probably postage stamps and office stationery, paper clips.

The Witness: Just different things.

Exam. Mittelbronn: Everything else.

By Mr. Guild:

Q. Now, you show sugar, 123 bags on December 31, 1956, at $9.05 would equal $1,113.15. That would be the inventory of the sugar?

A. That's right.

Q. Have you inventoried that at your cost or at the price that you would sell it?

A. At cost.

Q. You paid $9.05 for that 123 bags of sugar?

A. I wouldn't state to that effect. I don't remember.

Q. Well, you have been handling the purchases of sugar across the bookkeeping—

A. It varies.

Q. What would be the average cost of a hundred pound bag of sugar to E. and R. Shannon?

A. Now, where do you mean?

[fol. 230]. Q. Approximately the average of a hundred pound bag of sugar.

A. From J. Aron and Company?

Q. From J. Aron and Company, that you would pay J. Aron.

A. I would say about $8.50, $8.55. It varies, so I wouldn't want to state—

Q. It very seldom goes above $8.50 or $8.55, does it?

A. Well, it fluctuates. I wouldn't say whether it does or doesn't.

Q. Now, the most expensive type of sugar is called Supreme, isn't it?

A. Supreme.

Q. Then there is Himalaya, which is the least costly sugar?

A. That's right.

Q. Now, what would a hundred pound bag of Supreme sugar cost E. and R. Shannon today?

A. I would say it would be about $8.55. I don't really know. I am not a purchaser. I just keep the books.

Q. But you are familiar with the operation, after nine years, you would know the cost of sugar to E. and R. Shannon.

Exam. Mittelbronn: She's answered to the best of her knowledge the price would be $8.55.

Mr. Guild: All right.

By Mr. Guild:

Q. You put the price $9.05 there?

A. Well, that would be—we would, you know, at that date, we would figure that would be the cost of sugar.

[fol. 231] Q. Oh, you figured that would be the cost of it but that didn't come from your—

A. That would be our—

Q. Did that come from your invoice of J. Aron and Company to E. and R. Shannon?

A. No, sir.

Q. It did not?

A. No, sir.

Exam. Mittelbronn: What then is the source of this price figure of $9.05 if it's not obtained from the J. Aron invoice?

The Witness: That is the figure that we inventoried at.

Exam. Mittelbronn: I see.

The Witness: Just as we inventory our feed or livestock.

Exam. Mittelbronn: I see. Inventory value.

The Witness: Inventory value.

By Mr. Guild:

Q. But you generally inventory at cost, do you not? That is for income tax purposes.

A. Where it's been handled, unloaded and put in the warehouse, just like any feedstuff is.

Q. I see.

What is the usual payment period to J. Aron and Company by E. and R. Shannon for the sugar, within how many days?

A. Usually within ten days. It's sometimes beforehand. Sometimes a little longer.

Q. There are many instances where it runs longer than [fol. 232] ten days, are there not?

A. No, sir.

Q. There are not many instances?

A. No, sir.

Q. Usually within ten days?

A. That's right.

Q. All right.

Now, the trucks which are itemized on your balance sheet at $14,176.50, they are used in the transportation of feed and livestock as well as sugar, are they not?

A. Not all the trucks.

Q. Not all the trucks? What other are the trucks used for? You have three trucks. How many trucks are used for the transportation of livestock and feedstuff?

A. Well, I mean they are all—what I was trying to say is all the trucks don't go to Louisiana.

Q. No.

A. And further off. But they are all used in all the business.

Q. So that most of the time they would be used in the transportation of, say, livestock, feedstuff or salt, items like that, they are used in the transportation of those items for E. and R. Shannon, are they not?

A. All of the trucks, yes, but what I mean, they are not all gone great distances is what I meant, what I said the [fol. 233] first time.

Q. Well, how many trucks are there?

A. There's seven, I believe.

Q. Seven of them.

And how many are used for long distance hauling?

A. Well, what do you say by long distance hauling?

Q. How many go to Louisiana, we will say, transport livestock up to Louisiana? How many would be used for that?

A. Three.

[fol. 234] By Mr. Guild:

Q. Three. There are three really long distance hauling trucks, then?

A. That's right.

Q. And they are used in the transportation of live stock, feed stuffs and salt going toward Louisiana any great distance away from San Antonio?

A. Well, wherever Mr. Shannon has a customer that wants the product.

Q. But I say those items, and then on the backhaul they may or may not have sugar on them, is that correct?

A. Well, they may have sugar. They may have feed or whatever he buys.

Q. So that normally since the truck always goes out without sugar and only occasionally comes back with sugar, they are primarily used for transportation other than for sugar, is that correct?

A. Whatever he purchases is what they are used for.

Q. Whatever other than sugar?

A. That's right.

Q. What is mill equipment?

A. That is the grinders, to my knowledge, and any equipment—

Q. That's wholly unconnected with the sugar, isn't it?

Exam. Mittelbronn: Let the witness finish before you ask her a new question. Proceed.

A. It would be the different mill equipment which would [fol. 235] be the grinders and sackers, where they sew up sacks, to my knowledge. I mean I am not a mill hand. I am a bookkeeper. I don't know just what—all I see is—

By Mr. Guild:

Q. Well, would they be used in connection with the sugar, handling of sugar?

A. I couldn't answer that question.

Q. What are the drivers' salaries? What do they get paid?

A. Well, they will average around $80.00 a week.

Q. They will average around $80.00 a week and how many drivers would you average, that are in use in a week?

A. Five.

Q. Five.

So eighty times five would be about four hundred.

A. Now, when I say drivers, I don't know just what you are—

Exam. Mittelbronn: There are two types of drivers.

Mr. Guild: Well, she said drivers and five drivers, and I am referring to those drivers.

Exam. Mittelbronn: The witness will explain her answer. Proceed.

A. Well, I mean, see, we have, as I said, seven trucks. What drivers are you referring to?

By Mr. Guild:

Q. Well, do you have five drivers that you use on an average every week? That was your statement, is that correct?

A. Well, there's—I don't know just which drivers you are [fol. 236] referring to. There could be sometimes seven boys driving, but I mean there are seven trucks.

Q. But you said on an average five drivers are used every week, is that correct?

A. Not on the big trucks, no, sir, there's three.

Q. There's three drivers on the big trucks?

A. That's right.

Q. When you stated that the drivers, and you said five drivers, would average $240.00 out of the total payroll—

A. Not the five drivers, no.

Q. —then you meant that they were the three drivers that were—

A. That's right.

Q. —that were employed.

And the payroll also includes drivers that are not connected with the long distance hauling, is that correct?

A. In my over-all payroll.

Q. Yes.

There are other drivers. Only three are connected with the long distance hauling?

A. That's right.

Q. And what else would the payroll include, your salary, for one?

A. My salary and the order buyer.

Q. I beg your pardon?

A. My salary, the feed mill hands and fellows that unload [fol. 237] the sugar, and drivers, order buyer; live stock order buyer.

Q. Would you say the majority of that salary is expended for the handling and for the transportation of items other than sugar?

A. No, sir.

Q. You would not.

Then you would say, salaries, total payroll, would be expended, that is, a greater portion of that salary would be expended for the handling of the sugar and transportation of same as compared to the other items handled by Mr. Shannon?

A. I don't quite get you, what you are trying to ask me.

Q. Well, you said you had a total payroll, weekly average, of about $1,100.00.

A. That's right.

Q. And I asked you what portion of that, would it be greater or smaller, was expended for the handling and transportation of the sugar, or would it be greater for the handling and transportation of items other than sugar.

A. Well, that would vary also, I mean, you know, if he was buying a lot of feed at that time and cattle it could be more. It could be less. I just never figured an average on it.

Mr. Guild: Mr. Examiner, may I see the balance sheet?

Exam. Mittelbronn: Yes.

By Mr. Guild:

Q. Now, what would these notes payable, what do they represent?

[fol. 238] A. The notes payable?

Q. Yes, you have an item here of $11,000.00.

A. That would be to the bank.

Q. To the bank?

A. Yes, sir. Could be an equipment note in there, I think.

Q. All right.

What is the accrued expenses? Would that be like insurance, items of that sort?

A. Yes, social security taxes, workmen's compensation, insurance, and anything pertaining to expenses.

Q. How much losses has Mr. Shannon incurred in sugar over 1956?

A. Well, I couldn't tell you. I mean I don't really know the amount.

Exam. Mittelbronn: Losses of what nature, counsel?

Mr. Guild: Well, the witness testified that, I assume, if a sugar bag broke up, why, that sugar would be lost while it was on Mr. Shannon's truck.

The Witness: That's right.

Mr. Guild: Or in his warehouse, and that loss would be his.

The Witness: That's right.

By Mr. Guild:

Q. Losses of that similar nature, you don't know how much he's incurred in that type of loss?

A. Well, it would maybe be sold at a reduced price.

Q. Would that type of loss be reflected in your balance [fol. 239] sheet as a loss?

A. No, sir, it's in the purchasing and selling.

Q. You put it in the purchases and sales?

A. That's right.

Q. And you don't know how much losses? Were there great amounts of losses, that sort?

A. I couldn't tell you any amount. I know that there has been losses.

Q. How did they occur?

A. Well, sometimes in the way—in handling it, and then also in storage he's had losses occur.

Q. Do you have any sugar that is in a bonded warehouse now?

A. At this time?

Q. Yes.

A. Not that I know of.

Mr. Guild: That is all.
Mr. Wolff, Jr.: That is all. Thank you.
Exam. Mittelbronn: No redirect?
Mr. Wolff, Jr.: No, sir.
Exam. Mittelbronn: Thank you, Mrs. Masar, very much.

(Witness excused.)

Exam. Mittelbronn: Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.
Mr. Wolff, Jr.: I would like to call Mr. Wilcox, please.

[fol. 240] J. T. Wilcox was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Will you state your name, please, sir?
A. J. T. Wilcox.
Q. Where do you live, Mr. Wilcox?
A. 136 Shadwell Drive.
Q. Is that here in San Antonio?
A. Yes, sir.
Q. What business or profession are you in?
A. I am in the brokerage business.
Q. What kind of items do you handle as a broker?
A. I handle sugar, salt, dressing and canned soup, fish and oysters.
Q. You are a defendant or respondent, I believe, in this case, isn't that right?
A. That's right.
Q. Do you know Mr. Shannon and the other respondent?
A. Yes, sir.
Q. Would you tell us just in your own words what your dealings are with Mr. Shannon insofar as sugar is concerned?
A. Well, I sell Mr. Shannon sugar FOB Louisiana.
Q. What company do you sell through in Louisiana?
A. J. Aron & Company.

Q. Does J. Aron & Company pay you a commission on [fol. 241] your sales to Shannon?

A. That's right.

Q. Do you have any other interest in Mr. Shannon's operation other than receiving a commission from Aron?

A. That is all.

Q. If Mr. Shannon sells the sugar to Barq's or whatever names that were listed previously as the purchasers of sugar from him, do you receive a commission of any sort on those sales?

A. None whatever.

Q. Then your only profit, the more sugar he sells the more you make because you sell him the sugar from Aron & Company?

A. That's right.

Q. If somebody doesn't pay their account to Mr. Shannon on the sales to Barq's or Lawler or somebody, do you share in that loss in any way?

A. None whatever.

Q. Are you familiar, sir, with the operation of the sugar business, the actual mechanics of storing it and hauling it and things such as that?

A. No, that is not my business. I don't know anything about that.

Q. I see.

Are you familiar with the margin of profit in the sugar business?

A. Yes, sir.

[fol. 242] Q. Are you familiar with that margin of profit here in San Antonio on this date, the 29th of March?

A. Yes, sir.

Q. What in your opinion would be the reasonable, normal return per hundred pounds of a sugar dealer here in San Antonio at this date?

A. Any where from 25 to 35 cents on a hundred pounds.

Mr. Guild: That is FOB San Antonio?

The Witness: Huh?

Mr. Guild: FOB San Antonio?

The Witness: Yeah.

By Mr. Wolff, Jr.:

Q. That is based on the market here?

A. That's right.

Q. What is the present market here in San Antonio that sugar dealers would have to make or beat in order to sell a reasonable amount of sugar other than just isolated sales?

A. Well, a lot of them handle it on just two per cent, the cash discount, in quantities, and then it can be picked up here at the warehouse at the price less two per cent right there. They can pick it up in 25 bag lots or 50 bags or whatever amount they want at the carload price delivered in San Antonio.

Q. In other words, if somebody wanted to buy 25 bags of sugar, 2,500 pounds, he could buy it here from a warehouse at the carload price plus two per cent?

A. Less two per cent.

[fol. 243] Q. Less two per cent?

A. Yes.

Q. So that that is the figure that a sugar dealer has to beat in order to, or to match, in order to sell sugar?

A. That's right.

Q. Is sugar a perishable commodity?

A. Yes, sir.

Q. You mentioned other items that you handle. Is sugar the type of a commodity that has to be bought and sold by the broker or dealer in a fast manner, in other words, the purchase or sale, or have a rapid turnover of the particular item in order to realize any profit at all?

A. That's right, it has to be turned fast due to the cost of the item.

Q. The fact it will deteriorate?

A. That's right.

Q. And the fact it's a very short profit?

A. That's right.

Q. Are you familiar with any instances where Mr. Shannon has lost any sugar through deterioration or getting wet or anything like that?

A. Oh, yeah, he's had a few bags, not too many. Some get broke, and he will have to possibly sell them for a loss

to get rid of them, or they get wet, they get hard, you know, and it's unsalable. You can usually find some spot that he can sell it to.

[fol. 244] Q. Now, when that happens, something happens to the sugar, who takes the loss?

A. Mr. Shannon.

Q. Does the Aron & Company take any loss on it?

A. Absolutely not.

Q. Do you refund any of your commission?

A. Absolutely not.

Q. You say he hasn't had too much loss. Is that because he re-sells the sugar as fast as he can constantly trying to get rid of it?

A. That is right. In handling sugar the boys will break a bag once in awhile, maybe spill out five or ten pounds, something like that. Well, he will take a loss on that or something.

Mr. Wolff, Jr.: I believe that is all. Thank you.

Mr. Guild: No questions.

Exam. Mittelbronn: I think I would like to ask you a question.

The Witness: Yes, sir.

Exam. Mittelbronn: And in such capacity as broker you a broker just for J. Aron & Company or many other companies?

The Witness: Five other companies. I represent the Jefferson Island Salt Company, and handle a frozen seafood line, handle Mardis Gras Soup line out of Louisiana.

Exam. Mittelbronn: And i nsuch capacity as broker you make arrangements, do you make arrangements, that is, [fol. 245] only for the sales of the commodities or do you ever participate in arranging for the transportation?

The Witness: No, sir, just for the sales.

Exam. Mittelbronn: Thank you.

Mr. Wolff, Jr.: That is all. Thank you, sir.

(Witness excused)

Mr. Wolff, Jr.: Mr. Shannon.

Exam. Mittelbronn: Do you counsel wish to proceed or do you wish to have lunch? I am at your convenience. The day is—

Mr. Guild: I would like to proceed if it won't take too long.

Mr. Wolff, Jr.: I don't believe it will, sir. I would like to if it's all right with the Examiner, we would just as soon proceed.

Mr. Guild: All right.

Exam. Mittelbronn: Proceed.

Mr. Wolff, Jr.: Mr. Shannon.

RICHARD J. SHANNON was sworn and testified as follows:

Direct examination.

By Mr. Wolff, Jr.:

Q. Would you state your name, please, sir?

A. Richard J. Shannon.

Q. Where do you live, Mr. Shannon?

A. 439 Alexander Hamilton Drive.

Q. Is that here in San Antonio?

[fol. 246] A. That's right.

Q. What business or profession are you in?

A. Well, I am in the buying and selling of a number of different items.

Q. Would you tell us what items those are?

A. Well, we buy and sell livestock. We are also in the feed mill business. We sell corn, oats, wheat, bran, molasses, sugar and fertilizer and everything in the feed line.

Q. Mr. Shannon, how long have you been in business here in San Antonio?

A. Since 1934 or '5. I think it's 1934.

Q. Were you under the name of E. & R. Shannon?

A. That's right.

Q. What does the E. stand for?

A. Edward.

Q. Who is Edward?

A. My father. He died two years ago last February.

Q. You and he were partners in—

A. That's right.

Q. —various businesses?

A. That's right.

Q. And you have been on the yards or here in San Antonio since—I mean in this particular business—since 1934 approximately?

A. In the cattle end of it.

Q. When did you start handling sugar?

[fol. 247] A. I imagine a little over three years ago.

Q. And the other items, grain and fertilizer, molasses and stuff like that, when did you begin handling these other items?

A. That was about six years ago.

Q. I see.

So your operation is increasing, adding new, different items?

A. Lines, that's right.

Mr. Guild: Mr. Examiner, I will object to the leading of the witness.

Exam. Mittelbronn: Objection sustained. Counsel will proceed accordingly.

Mr. Wolff, Jr.: All right, sir.

By Mr. Wolff, Jr.:

Q. Who is Emma Shannon?

A. That is my mother.

Q. Is she a partner in the business?

A. She is a partner, yes.

Q. Would you explain to us just what interest she has in the business and what she does?

A. She does nothing whatsoever in the business. I operate the business, myself. She has a 25 per cent interest in the business and I have 75 per cent interest, and since my dad died we kind of split up the other 25 per cent, and I bought my sister's eight per cent out of the business.

Q. I see.

[fol. 248] Now, have you ever been over to Louisiana concerning sugar?

A. Yes, sir. I have, I have talked to—been to two or—let's see, it's two different sugar companies over there, talking to them on sugar.

Q. Why do you buy from Aron as opposed to the other outfits?

A. Well, we got started with them and we are just with them. That's about all I can say. We just got started with them.

Q. They give you a price that you are satisfied with?

A. At times we are and at times we are not.

Q. Have you ever done anything in the case that the price is too high to try to change?

A. Yes, we went over in Louisiana and he was charging us too much at one time, ten cents too high, and I went to another sugar company and they agreed to give me a ten-cent lower par price than Aron did on sugar, but he didn't have the different grades of sugar that we needed.

Q. So you continued operating with Aron?

A. So we continued operating with Aron.

Q. Now, have you ever had occasion to take any losses on sugar shipments?

A. Well, the breakage and sugar getting wet, we have taken losses, yes.

Q. Who bears those losses?

A. The company does.

Q. That is E. & R. Shannon, you mean?

[fol. 249] A. That's right.

Q. Have you ever had occasion to make any deals for the sale of sugar and have the purchaser here in San Antonio refuse to take it?

A. Yes, we have.

Q. Could you tell us the circumstances about that?

A. Well, at times we have had—we thought this man was going to buy sugar, and we order it, and when the truck gets in, beet sugar has been an obstacle against us in price—

Q. Where does beet sugar come from?

A. It comes from Colorado and some shipped from California.

Q. Is it coming into the market here now?

A. Yes, sir.

Q. And Canadians sometimes beat your price?

A. They are beating it right now.

Q. Now, that sugar that you thought that you had sold and the person refused to take it, what do you do with it?

A. Well, we have to put it in storage.

Q. Who bears the loss in case you can't re-sell it?

A. Well, the company would.

Q. Do you try to sell as much sugar as possible day by day?

A. Well, as people call in, we call them, we have an idea just about what we are going to use.

Q. Do you try to turn over your merchandise as fast as you can?

A. We try to turn it over. Otherwise the sugar, if it [fol. 250] stands too long, will get hard in the bag, and the customers complain about it, the dampness.

Q. Do you sell your sugar here for cash by and large or by and large for credit?

A. For credit.

Q. What credit terms do you have with your various purchasers?

A. Well, we generally give them ten days.

Q. And in case they pay in ten days do they get a discount?

A. A two per cent discount.

Q. You heard your bookkeeper testify as to certain figures in the record. So as to save time do you have anything to state as to any reason why those figures insofar as you know are not correct figures?

A. Well, to my best knowledge they are correct.

Q. Do you sell sugar in less than carload lots or less than the entire amount that comes, truckloads?

A. We sure do, and I believe we have some things there we can show that state that.

Q. Mr. Shannon, I show you some yellow sheets purporting to be invoices, E. & R. Shannon Company, and ask whether or not you have ever seen these instruments before?

A. Yeah, they are in our books over there.

Q. Just looking at those refresh your memory, would you tell us if you only made isolated sales of less than truckload lots of sugar or have you made frequent sales of less than truckload lots of sugar?

[fol. 251] A. We have made frequent sales of less than carload lots.

Q. Do those instruments represent the sales in the last year or even in a less period of time on less than truckload lots of sugar?

A. That's right.

Q. Well, where does that sugar come from?

A. It comes out of our warehouses.

Q. Do you try to sell it in less than truckload lots or do you prefer selling in truckload?

A. Well, that is up to the customer. We leave that up to the customer.

Q. You get the same price on less than a truckload lot per bag as you do a truckload lot?

A. We try to get—we generally get more for less than truckload lots.

Q. Why do you get the additional amount?

A. Well, the handling, the operation and handling, a higher cost.

Mr. Wolff, Jr.: I believe that is all.

Exam. Mittelbronn: Cross examination.

Cross examination.

By Mr. Guild:

Q. Mr. Shannon, what type of business were you in in 1934?

A. We were in the cattle business.

[fol. 252] Q. Just relegated to the cattle, sale of cattle?

A. Cattle, that's right.

Q. When was this refusal that you spoke of on your direct testimony? Do you recall?

A. Refusal? What do you mean by refusal?

Q. Refusal of sugar that you had. You stated that someone refused sugar that you had ordered.

A. We had a number of instances like that.

Q. When you speak of refusals—

A. In other words, we thought we would get a load in, we would have it sold, and wouldn't have it sold, and we would put it away for storage and lots of times we needed the truck right away, I got to put it away in storage.

Q. In other words, you had the order for the sugar and went up and got the sugar?

A. No, sir, we never have no orders on it at all. There's never an order going out.

Q. What do you mean by refusal then?

A. Refusal, we thought we had it sold to some different people.

Q. Well, then you hadn't purchased the sugar specifically for that customer that you thought you had sold it to?

A. No, no, no.

Q. Well, then, in the case you hadn't done that and the customer refused, in other words, what the customer did, he just said "I thought I wanted it and I don't want it"? [fol. 253] A. Well, lots of times we might call him, we might have a load on the way back and we will call a man and say "Would you buy a load of sugar?" And he may say "Yes", and "Call me tomorrow if I can use it or not," or "I might use it at the end of the week."

Q. Well, that truckload is already headed towards San Antonio?

A. That's right, yes, and sometimes we got it there on our property, our two and a half acres, on our property, that truckload.

Q. So nothing about the refusal cost you any extra, you didn't put yourself out because of that refusal, did you?

A. Well, lots of times the market is breaking, we got to put it in storage, and we have to sell it at a lower market.

Q. I know, but you had the sugar on order already, it was on the truck, the fact that it was on the truck and already purchased didn't mean that you had gone out of your way to obtain that sugar for that specific person, did it?

A. No, not necessarily, no.

Q. So that actually his refusal didn't result in any extra loss to you, it just meant that you didn't get a sale?

A. That's right.

Q. Now, could you send one of your big trucks up there with a driver, paying him a salary and paying the expenses of that truck, send an empty truck up to Supreme, Louisiana and transport that sugar back to San Antonio and sell [fol. 254] that sugar at a profit if you had just that operation, an empty truck up there and back?

A. We have done it.

Q. But could you do it profitably?

A. We have done it, yes, where we get a lot more money, where we get an order, maybe a load of sugar back, and tell us they need a load of sugar, and will we make a special trip there, but we get more money hauling it that way.

Q. But you couldn't send a truck up, I mean just, say, operate that way, send an empty truck up to Supreme, Louisiana, and buy sugar for sale in San Antonio?

A. Well, we have one big truck we can send and make a profit with it.

Q. You can?

A. Yes, sir, we have one big truck we can send and make a profit with it.

Q. How much does that truck carry in gross sugar weight?

A. 37,500 pounds.

Q. 37,500 pounds.

And let's see, that would be 375 bags, would it not?

A. That's right.

Q. How much would those bags cost you on an average?

A. On an average?

Q. Uh-huh, just what would be the cost to you?

A. On an average what is the sugar selling for at the time?

Q. Well, I am just asking you. What would be the average?

[fol. 255] A. Whatever the sugar is selling for at the time. I wouldn't know. What period do you want?

Q. Well, you stated you could send an empty truck up to Supreme, Louisiana and haul it back for a profit.

A. Yes, sir.

Q. In other words, you don't need to back haul sugar for a profit?

A. What is that?

Q. You don't need—you could operate without any other business, you could send empty trucks up to Supreme, Louisiana right now, and haul sugar back and make a profit on the sale of sugar in San Antonio at the price sugar is selling for now in San Antonio?

A. No, I do not.

Q. Oh, you couldn't?

A. No, I couldn't do that.

Q. So that is why most of the sugar is coming back as a back haul from the transportation of livestock and feed stuffs that's going up into the direction toward Louisiana?

A. I am in the buying and selling business, yes, sir, I am buying and selling.

Q. But I mean that is the reason why you are backhauling it?

A. I am backhauling to make money.

Q. I know that.

A. To make a profit. I am backhauling to make a profit.

[fol. 256] Q. But in order to make that profit on the backhaul of sugar you would have to have something going up to Louisiana, would you not, as you stated you couldn't empty truck it up?

A. That's right.

Q. In other words, do you have the sale of livestock in Louisiana?

A. We have grain, livestock, anything we can buy and sell at a profit.

Q. And you are handling that product or those products and are largely in that business of livestock and grain?

A. Grain, molasses, sugar, all of them.

Q. And has that been for the whole six years that you have been in that type of business, selling up in Louisiana?

A. That's right, that's right.

Q. And until three years ago, why, you hadn't been handling sugar, so what did you return haul on your trucks?

A. What did we return haul?

Q. What was your backhaul?

A. Well, we brought salt, we brought grain.

Q. Did any of your trucks ever return empty?

A. Ever return empty?

Q. Uh-huh.

A. I guess there was times, yes, I guess there was times.

Q. So that when you backhauled grain and salt, anything you could sell, that grain or salt, at a profit, would mean [fol. 257] just that much off of what your expenses were in the initial haul of the livestock and feed stuffs up to Louisiana, is that correct?

A. Well, it was a profit to us. That is all I could say.

Q. And I think when we were in Mr. Wolff's office you stated that if you only could get the sugar at a one cent profit when it got back to San Antonio that would be one cent that you had. Do you remember making that statement?

A. I don't believe I made that statement. I don't believe I made that statement.

Q. But that would be true, I mean if you had livestock to be delivered up in Louisiana, and you transported that livestock up there and you backhauled the sugar, anything you made on that sugar would be just that much more profit? If you didn't have that sugar you would have had an empty backhaul or you would have tried to arrange for grain?

Mr. Wolff, Sr.: That is argumentative, Mr. Examiner.

Exam. Mittelbronn: Sustained.

By Mr. Guild:

Q. Well, is that correct?

Exam. Mittelbronn: The objection was sustained. The question is argumentative.

Mr. Guild: I don't know how to ask the witness any other way except that:

By Mr. Guild:

Q. Anything you receive on your sugar in a transportation haul that initiated as a livestock transportation up toward Louisiana would be that much profit?

[fol. 258] Mr. Wolff, Sr.: We still object.

Exam. Mittelbronn: The objection is sustained. There is no basis laid. Maybe the operation in carrying the livestock was a loss. Be specific, counsel.

Mr. Guild: Well, he stated he's in the livestock business.

Exam. Mittelbronn: Don't argue with the Examiner.

Mr. Guild: That is all.

Mr. Wolff, Jr.: That is all. Thank you, Mr. Shannon.

Exam. Mittelbronn: Mr. Shannon, have you ever received sugar from Louisiana since you have been handling

that commodity in the past three years, whatever it is, via any carrier for hire, that is common carrier or contract carrier?

The Witness: No, sir.

Exam. Mittelbronn: You have always transported the commodity in your own trucks?

The Witness: That's right, yes, sir.

Exam. Mittelbronn: Does the same hold true for all other commodities which you handle?

The Witness: Yes, sir.

Exam. Mittelbronn: You have never employed the use of a for hire carrier?

The Witness: No, sir.

Exam. Mittelbronn: In the conduct of your business?

The Witness: No, sir.

Exam. Mittelbronn: Thank you, sir.

[fol. 259] Mr. Wolff, Jr.: Thank you, Mr. Mittelbronn.

By Mr. Guild:

Q. Mr. Shannon, may I ask a question.

Do you ship livestock by rail?

A. Do I ship livestock by rail?

Q. Yes.

A. Yes, sir, yes, sir.

Exam. Mittelbronn: Did the witness understand the Examiner's question, namely, had you ever employed any carrier for hire to transport any of your products in your business?

The Witness: Excuse me, but the way I understood you to state it, you stated sugar.

Exam. Mittelbronn: I stated first sugar. Then I said any of your commodities that you handle. You misunderstood me.

So you have employed in the past a contract carrier for the transportation of livestock? I mean a common carrier, rail.

The Witness: Yes, sir, yes, sir, and grain.

Exam. Mittelbronn: And grain also?

The Witness: Yes, sir.

Exam. Mittelbronn: Those were on your outbound shipments to your customers, I take it?

The Witness: Inbound, inbound and outbound, too.

Exam. Mittelbronn: Oh. Do you still employ any common carriers for hire in the transportation of the articles you handle other than sugar?

The Witness: Coming in we do. In other words, inbound [fol. 260] to San Antonio we do get grains and different things brought in to us by the railroad.

Exam. Mittelbronn: From origins in Louisiana?

The Witness: Louisiana, yes, sir, yes, sir.

Exam. Mittelbronn: I have nothing further. Counsel?

Mr. Guild: I have nothing further.

Mr. Wolff, Jr.: Nothing, thank you.

(Witness excused.)

RESPONDENT RESTS

Mr. Wolff, Jr.: The Respondent rests.

Mr. Guild: We rest. I request the opportunity to file briefs.

Exam. Mittelbronn: Fine. Off the record.

(Discussion off the record.)

Exam. Mittelbronn: On the record.

In the off the record discussion it was agreed by counsel that briefs would be submitted. The brief date is hereby set on May 15, 1957.

If there is nothing further to be brought before the Commission the record is closed.

(Whereupon, at 12:15 p.m., Friday, March 29, 1957, the hearing in the above-entitled matter was closed.)

[fol. 261]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. 1

MC-C-2055, Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, and J. T. Wilcox, doing business as Wilcox Brokerage Company

PURCHASES OF SUGAR FROM J. ARON & CO., SUPREME, LOUISIANA

Shipment Date	*Invoice No.*	*Date*	*Dray Receipt No.*	*Date*	*Cost F.O.B. Supreme, La.*
5-15-56	1683	5-14	3893	5-15	$2610.72
5-27-56	2266	5-26	4267	5-27	3068.62
6-5-56	2704	6-4	4531	6-5	3068.63
6-6-56	2751	6-6	4589	6-6	2895.17
6-16-56	3215	6-16	4887	6-16	2521.54
6-21-56	3440	6-21	5034	6-21	2928.24
7-20-56	4954	7-20	6144	7-20	3068.63
7-29-56	5372	7-28	6389	7-29	2608.76
7-31-56	5440	7-31	6437	7-31	3057.60
8-2-56	5549	8-2	6532	8-2	2602.88
8-6-56	5663	8-5	6667	8-6	2618.56
8-15-56	6100	8-15	7011	8-15	2536.73
8-23-56	6349	8-22	7228	8-23	3050.25
8-30-56	6665	8-30	7459	8-30	3058.83
8-29-56	6606	8-29	7412	8-29	2536.73

[fol. 262]

SALES OF SUGAR BY E. AND R. SHANNON, SAN ANTONIO, TEXAS

Sales Slip No.	*Date*	*Consignee San Antonio*	*Resale Price Delivered San Antonio*	*Difference*	*Net Profit in cents per 100 lbs.*
1262	5-16	Lawler	$2736.16	$ 125.44	39.2
1267	5-29	Judson Knowlton	3236.45	167.83	44.7
1271	6-7	Knowlton	3252.37	183.74	49
1273	6-8	Lawler	3034.32	139.15	39.2
1277	6-17	Barq's	2658.25	136.71	44
1283	6-23	Lawler	3069.36	141.12	39.2
1296	7-21	Lawler	3242.75	173.74	46.3
1297		Knowlton			
1298	7-30	Lawler	2734.20	125.44	39.2
1299	8-2	Lawler	3119.09	143.08	39.2
1300	8-4	Barq's	2744.00	141.12	44
1301	8-7	Knowlton	2775.36	156.80	48.1
1306	8-17	Knowlton	2673.44	136.71	44
	8-24	Barq's	3197.25	147.25	39.2
1313	8-31	Lawler	3182.55	123.72	33
1312	8-31	Guerra (Laredo)	2620.27	83.54	27
				$2125.39 (Total)	35.74 (Average)

[fol. 263]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. 2

MC-C-2055, Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, and J. T. Wilcox, doing business as Wilcox Brokerage Company.

Exhibit showing rail rates in carload and less carload quantities on Sugar, Beet or Cane, between Supreme, Louisiana, and San Antonio, Texas, effective May 15, 1956, through August 30, 1956.

[fol. 264]

RAIL RATE, CARLOADS

Effective on May 15, 1956 through August 30, 1956

ON

SUGAR, BEET OR CANE

Supreme, La. to San Antonio, Texas.

Rate, Carloads 69* cents per 100 pounds.

Minimum Weight 60,000 pounds.

Authority:

Item 1912-A, Page 6, Supplement 15, SWL Tariff 72-F, Agent F.C. Kratzmeier's ICC 4088 effective Dec. 31, 1955.

Base rate of 65 cents per 100 pounds subject to X-196-A increase.

(Supreme, La. takes Group 1 basis as shown on Page 8 of tariff.

Routing:

Page 93 of tariff as explained on Pages 225 and 226.

From Supreme, La., a station in Louisiana assigned Group 1 on Southern Pacific Lines.

To San Antonio, Texas, a station located on T&NO (Sou. Pac. Lines), I-GN (MP Lines), SAU&G (MP Lines) and MKT of T.

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* For note referred to, see next page.

Route Numbers:	Explanation
SP 2	Sou. Pac. Lines
SP 122	Sou. Pac. Lines, Houston, Tex., MKTofT
SP 125	Sou. Pac. Lines, Houston, Tex., Mo. Pac. Lines

* Rate includes increase of 6 percent published in Table 1, Page 18 (as instructed in Item 5) of Tariff of Increased Rates and Charges X-196-A, Agent F. C. Kratzmeier's ICC 4193, effective March 7, 1956.

Note—The Texas and New Orleans Railroad Company (Sou. Pac. Lines), International-Great Northern Railroad Company (MP Lines), San Antonio, Uvalde and Gulf Railroad Company (MP Lines) and Missouri-Kansas-Texas Railroad Company of Texas participating in above rate and routes on Sugar from Supreme, La., to San Antonio, Texas, are included in list of participating rail carriers shown on pages 2, 3, 4 and 5 of SWL Tariff 72-F.

[fol. 265]

Rail Rate—Less Carloads
Effective on May 15, 1956 through August 30, 1956
on
Sugar, Beet or Cane
Supreme, La. to San Antonio, Texas.

Rate, LCL 138* cents per 100 pounds.

Minimum Weight LCL

Authority

Class 55, Items 18820 (other than raw), and 18825 (raw), uniform freight classification No. 3, Agent Geo. H. Dumas' ICC A-3, effective Sept. 11, 1955

and

SWL Tariff SW-1004, Agent F. C. Kratzmeir's ICC 3997, effective May 30, 1952. Base rate of $1.30 as shown on Page 175 for rate basis 517 as shown on page 88 from Thibodaux, La., to San Antonio, Texas, applicable from Supreme, La., per page 350 of National Rate

* For note referred to, see next page.

Basis Tariff 1, Agent L. E. Kipp's ICC A-3931, effective May 30, 1952, and Page 154 of National Rate Basis Tariff 1-A, Agent W. J. Prueter's ICC A-4160, effective September 1, 1956.

* Rate includes increase of 6 percent published in Table 1, Page 18, (as instructed in Item 5) of Tariff of Increased Rates and Charges X-196-A, Agent F. C. Kratzmeir's ICC 4193, effective March 7, 1956.

Routing:

Routing instructions in Item 1000-Series of SWL Tariff SW-1004 provides for routes specified in and explained on Pages 1115, 1116 and 1118 of SWL Tariff 221-D, Agent F. C. Kratzmeir's ICC 4173, effective November 15, 1955.

FROM: Supreme, La. (Sou. Pac. Lines Station 315)

To: San Antonio, Tex. (Sou. Pac. Lines Station 3365)
(IGN (MoPac Lines) Sta 3670
(SAU&G (MoPac Lines) Sta 4600
(MKTofT Station 4371

[fol. 266]

The Routes and items covering are:

Route	82, Item	2, Table 8282,	Page 1062
Route	139, Item	26, Table 5282,	Page 859
Route	151, Item	26, Table 5282,	Page 859
Route	151, Item	2, Table 5582,	Page 871
Route	443, Item	26, Table 5282,	Page 859
Route	443, Item	2, Table 5582,	Page 871
Route	443, Item	106, Table 4782,	Page 538
Route	803, Item	2, Table 5582,	Page 871

Route Numbers	EXPLANATION
82	Sou. Pac. Lines
139	Sou. Pac. Lines, Austin, Tex. Mo Pac Lines
151	Sou. Pac. Lines, Beaumont, Tex., Mo Pac Lines
443	Sou. Pac. Lines, Houston, Tex., Mo Pac Lines
443	Sou. Pac. Lines, Houston, Tex., MKTofT
803	Sou. Pac. Lines, San Antonio, Tex., Mo Pac Lines

NOTE: The Texas and New Orleans Railroad Company (Sou. Pac. Lines), International-Great Northern Railroad Company (Mo. Pac. Lines), San Antonio, Uvalde & Gulf Railroad Company (Mo. Pac. Lines) and Missouri-Kansas-Texas Railroad Company of Texas participating in above rate and routes on sugar from Supreme, La., to San Antonio, Texas, are included in list of participating rail carriers shown on following pages of tariffs involved:

SWL Tariff SW-1004—Pages 3 and 4

SWL Tariff 221-D—Pages 3, 4 and 5

Uniform Freight Classification 3—Pages 5, 6, 7, 8 and 9

National Rate Basis Tariff 1—Pages 4, 5, 6, 7, 8, 9, 10 and 11

National Rate Basis Tariff 1-A—Pages 3, 4, 5, 6, 7 and 8.

[fol. 267] EXHIBIT No. 3

BEFORE THE INTERSTATE COMMERCE COMMISSION

MC-C-2055, Emma Shannon and Richard J. Shannon, doing business as E. and R. Shannon, and J. T. Wilcox, doing business as Wilcox Brokerage Company.

Exhibit showing regular route common motor carrier rates on sugar, beet or cane, between Supreme, Louisiana, and San Antonio, Texas, effective May 15, 1956, through August 30, 1956.

[fol. 268]

RATES VIA REGULAR ROUTE COMMON MOTOR CARRIERS

ON

SUGAR, BEET OR CANE, OTHER THAN RAW—

From SUPREME, LOUISIANA
To SAN ANTONIO, TEXAS

In effect between the dates of May 15, 1956, and August 30, 1956, (both inclusive).

(1) Rate 170 cents per 100 pounds. Applicable to L.T.L. Shipments.

(2) Rate 109 cents per 100 pounds, Volume Minimum wgts. 14,000 lbs.

(1) Tariff Authority:
LTL

Item 40840, National Motor Freight Classifications A-2 and A-3, American Trucking Associations, Inc., MF-I.C.C. Nos. 6 and 8 respectively. Class 55—LTL Quantities.

NMFC A-2 Effective from May 15, 1956 through June 6, 1956.

NMFC A-3 Effective from June 7, 1956 through August 30, 1956.

Southwestern Motor Freight Bureau, Inc. Tariff 301-A, J. D. Hughetts, Agent, MF-I.C.C. No. 221 provided the LTL Class 55 rating of 170 cents between the dates of May 15, 1956 and August 30, 1956, both inclusive.

Item 10 D, Supplement 27, SWMFB Tariff 301-A, Effective February 2, 1956 and remaining in effect through August 30, 1956 subjects rates in tariff 301-A to National Motor Freight Classification A-2 and its successive issue NMFC A-3 (See Item 2300, Page 63, Tariff 301-A).

[fol. 269] Tariff 301-A is constructed on the group to group principle. Supreme, La. is assigned the

Thibodaux, La., group and San Antonio, Tex. is assigned the San Antonio, Tex. group (Pages 15 and 33, original tariff).

Rates basis 517 is provided from Thibodaux group to San Antonio group (Page 137).

Item 2400-A, Sup. 27, 301-A refers to pages 211 to 218 of tariff (as amended) for rates to apply in connection with NMFC A-2 (and A-3).

Page 213 shows the Class 55 rate in connection with rate basis 517 to be 160 cents—(Column 1).

Item 2450-B, Sup. 27 and Item 2450-C, Sup. 37 explain that the Column 1 rate is applicable in connection with LTL shipments.

Supplement 33 (Effective March 7, 1956) provides that the rate of 160 cents shall be increased to 170 cents.

(2) Tariff Authority:

Volume

Exception rate. Item 10, (paragraph 1, (b)). Southwestern Motor Freight Bureau, Inc., tariff 15-I, J. D. Hughett's MF-I.C.C. 224 states that the ratings, rules and weights provided in tariff 15-I take precedence over similar matter in National Motor Freight Classification.

Rate 109 in Class 35 E, Min 14,000 as provided in item 4970 (page 58) Southwestern Motor Freight Bureau, Inc., tariff 15-I, J. D. Hughett's MF-I.C.C. No. 224. Ratings and Rates remained in effect between May 15, 1956 and August 30, 1956, both inclusive.

[fol. 270] Item 4970, SWMFB Tariff 15-I provides volume rating of Class 35 E on Sugar in the territory referred to as Basis B-1 which is explained in item 10120 of the same tariff as being applicable in connection with the rates in Southwestern Motor Freight Bureau, Inc. tariff 1-K, J. D. Hughett's MF-I.C.C. No. 205 (See page 29 of Tariff 15-I).

Item 10520 (page 99) of Tariff 15-I provides for successive publications and by so doing authorizes use

of SWMFS Tariff I-M, J. D. Hughett's MF-I.C.C. No. 245. Tariff 1-M was effective between May 15, 1956, and August 30, 1956 (inclusive).

Item 10-A Supplement 16 and Item 10-B Supplement 27, (paragraph 2 (b)) SWMFB Tariff 1-M provides for the use of exception ratings in Tariff 15-I (Basis B-1) in connection with the rates in tariff 1-M.

Item 2000 of Original tariff 1-M and Item 2000-A, Supplement 27 to tariff 1-M (Effective between May 15, 1956, and August 30, 1956, inclusive) provide that the Basis B-1 ratings in tariff 15-I shall proceed through the first class (Class 100) in Item 2020 of the same (1-M) tariff to subordinate rates in the rate table in Section 4 of Tariff 15—which is explained on page 36 and in item 10 of tariff 15 as being Tariff 15-I, J. D. Hughett MF-I.C.C. No. 224.

Item 2020 of tariff 1-M is a distance table of first class rates (Class 100).

Rules for computing distance are provided in paragraph 5 of Item 10-A, Supplement 16 and Item 10-B, Supplement 27 to tariff 1-M. These items also provide for the use of Tariff 14-D issued by SWMFB, Inc., J. D. Hughett's MF-I.C.C. No. 234 to obtain distances used in determination of rates in Tariff 1-M.

[fol. 271] Table 1560 (Page 239) of Mileage Tariff 14-D shows distance of 61.7 miles from Supreme, Louisiana, to Franklin, Louisiana. Page 115 of the same tariff shows distance of 465.7 miles from Franklin, La. to San Antonio, Texas. Combining these figures produces a distance of 527.4 miles from Supreme, La. to San Antonio, Texas. (See item 90, page 30, for rules for computing).

Applying distance of 527.4 miles against the first class rates in table of rates shown in item 2020 of tariff 1-M the result is a first class (Class 100) rate of 339 cents. This rate of 339 is increased to 359 cents as authorized by Item 1-A Supplement 18 to Tariff 1-M Effective

between May 15, 1956, and August 30, 1956, inclusive. Referring to the rate table in Section 4 of tariff 15-I, pages 167 and 168 and applying the first class rate of 359 against the table we obtain Class 35 E Rate of 1.09.

Examination of tariffs shows that no stopover or multiple delivery privileges were applicable in connection with these rates—

Thus:—

5000 pound lot would be subject to rate of 170
10,000 pound lot would be subject to rate of 109 in connection with minimum wgt of 14,000#.

[fol. 272] EXHIBIT A TO COMPLAINT.

Clerk's Note:

"Report and order recommended by R. J. Mittelbronn, Hearing Examiner with Notice to Parties, served August 29, 1957" is omitted from the record here as it appears at page 9, side folio 11 supra.

[fol. 278] EXHIBIT B TO COMPLAINT

Clerk's Note:

"Report and Order of the Commission, decided August 3, 1959 with Appendices" are omitted from the record here as they appear at page 17, side folio 17 supra.

[fol. 297]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

In the Matter of

EMMA SHANNON AND RICHARD J. SHANNON DBA E. AND R. SHANNON AND J. T. WILCOX, DBA WILCOX BROKERAGE COMPANY—INVESTIGATION OF OPERATIONS

PETITION OF EMMA SHANNON AND RICHARD J. SHANNON DBA E. AND R. SHANNON FOR RECONSIDERATION—
Filed September 8, 1959

Due date of Petition: September 10, 1959

Statement of Case

This is a proceeding in the nature of the investigation of the operations of Emma Shannon and Richard J. Shannon, dba E. & R. Shannon Co., hereinafter called petitioners, or respondents or Shannons, and J. T. Wilcox dba Wilcox Co. The proceeding against J. T. Wilcox has been discontinued.

No statement of fact in this statement of the case will cite parts of the Statement of Facts to support the statement, but instead an evidence abstract will be contained immediately after this statement, which will cite relevant portions [fol. 298] of the Statement of Facts to all facts herein contained and contained in the argument, so that this statement will be merely a brief introductory statement setting up the general nature of this matter.

The purpose of the investigation was and is to determine whether or not certain operations of the Shannons are violations of the Interstate Commerce Act. More particularly, Richard J. Shannon was previously a partner with his father who died and now he is technically a partner with his mother, Emma Shannon, who owns an interest in the business by virtue of her husband's death, but actually, Richard Shannon operates and manages the business him-

self. According to Mr. Leon J. Whitehead, the District Supervisor of the Interstate Commerce Commission, Bureau of Motor Carriers with Headquarters at San Antonio, Texas, the facts developed by him and resulting in the hearing were developed by a mere routine investigation. The operations of E. & R. Shannon had been previously investigated by the Interstate Commerce Commission within the past several years, with no action taken against E. & R. Shannon, even though their operations were the same at the date of the prior investigation as they are now.

E. & R. Shannon are in the business of buying and selling many items including livestock, feed stuffs, molasses, fertilizers, salt and sugar. The only question that has been raised concerning their buying and selling of sugar involves whether or not they are a private carrier and it is therefore unnecessary for them to obtain an Interstate Commerce Commission permit to transport the sugar which admittedly is taken across the state line. Respondent Shannon contends that he is clearly a private carrier, is legiti- [fol. 299] mately in the sugar business and has been for several years and, therefore, is not required to obtain a permit to transport his sugar.

After the hearing in this matter was completed both parties filed written briefs. Subsequent thereto the hearing examiner prepared and filed a recommended report and order recommending that the investigation of Emma Shannon and Richard J. Shannon dba E. & R. Shannon be discontinued. The Bureau of Inquiry and Compliance filed exceptions to the Examiner's report and the Respondents replied to such exceptions. Thereafter Division 1 of the Interstate Commerce Commission made a report concerning this matter and an order requiring respondents to cease and desist forthwith and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce of the character found in the said Division report to be unlawful unless and until appropriate authority therefor is obtained, such order to become effective September 18, 1959. The said Emma Shannon and Richard J. Shannon dba E. & R. Shannon hereby file this their motion for reconsideration before the Interstate

Commerce Commission to reconsider such report of the Commission by Division 1.

Evidence Abstract

E. & R. Shannon are a partnership with E. Shannon being dead and Richard Shannon and Emma Shannon having a 25% interest in the business (Statement of Facts—SF 73-74). J. T. Wilcox is in the brokerage business handling many items and sells Mr. Shannon sugar through J. Aron & Co. in Louisiana, upon which Wilcox receives a commission from J. Aron & Co. (SF 67-68). That Wilcox has no interest in the Shannon business except the com- [fol. 300] mission he receives from J. Aron & Co. (SF 68). That the facts developed by Mr. Whitehead, the District Supervisor with the Interstate Commerce Commission at San Antonio were made and developed as a result of a routine investigation (SF 13). That about two years prior to the hearing, Mr. Shannon received a communication from the commission concerning the question of his sugar business and no action was taken against him at that time (SF 21). That Mr. Richard Shannon is in the business of buying and selling livestock, in the feed mill business and also sells corn, oats, wheat, bran, molasses, sugar, fertilizers and everything in the feed line (SF 73), also salt (SF 16). That Shannon has been in business since about 1934 and began handling grain, fertilizers, molasses and similar items about six years ago (SF 73-74) and sugar a little over three years ago (SF 73-74). That Mr. Shannon has seven trucks valued at $14,176.50 (SF 45) as of December 31, 1956, (SF 42-43). That of these seven trucks (SF 60) only three of them are used for long hauling which includes the hauling of sugar (SF 59-60). Also the trucks are not only used for hauling sugar but for hauling many other items. That the total amount of fixed assets of the company including mill equipment, office furniture, automobiles, etc. is $59,350.26 as of December 31, 1956, (SF 46-47; SF 42-43). That the asset accounts listed on the balance sheet as of December 31, 1956, remained fairly constant during the year 1956 and were constant up to the date of the hearing (SF 49). That in addition to the fixed

asset accounts there were $56,459.91 in current assets of which $30,000.00 was in accounts receivable leaving $26,000.00 in actual assets including approximately $4,700.00 [fol. 301] cash and the rest prepaid expenses, inventories, etc. (SF 48) so that the three trucks being used to haul sugar represented in a total of seven trucks, the seven trucks being valued at $14,176.50 was a small percentage of the total assets of the company, and further that such trucks used for hauling sugar were not used for same exclusively but on the contrary were also used to haul many other items. That the salaries paid the truck drivers used on the large trucks average about $240.00 per week (SF 50) out of the total payroll of $1,100.00 per week (SF 50) and, of course, as above stated, the three truck drivers on the three large trucks were not paid exclusively for hauling sugar but hauled many other items. That Mr. Shannon purchases sugar from J. Aron & Co., sugar refinery, Supreme, Louisiana, and that the sugar is billed to Mr. Shannon. This is admitted by Mr. Whitehead (SF 21-22). Also when Mr. Shannon sells sugar, such purchaser purchases the sugar from Mr. Shannon. This is pointed out because Mr. Whitehead used the word "consignee" to designate the person to whom Mr. Shannon sold the sugar and in Exhibit No. 1 introduced into evidence and to which respondents Shannon and Wilcox objected, the word "consignee" was used. However, Mr. Whitehead admitted that he used this word in error and that the sugar was always billed to Mr. Shannon and that the person Mr. Shannon sold sugar to should have been designated as the purchaser (SF 22). That Mr. Shannon purchases sugar from Aron because he got started with them (SF 75) and has gone to Louisiana to attempt to get a reduction in price and actually contacted another concern to get a lower price, but that that concern did not have the needed grades of sugar so that Mr. Shannon has continued dealing with Aron (SF 75). [fol. 302] That when something happens to the sugar after it is purchased from J. Aron & Co., the loss on same is borne wholly by Shannon (SF 75-76; SF 70-71). That Shannon does not take orders for sugar and then obtain the sugar from Louisiana (SF 79) and, in fact, on a number of

instances, he has had some sugar already en route coming back and thought he had the sugar sold and it turned out that the prospective purchaser refused the sugar which meant that it would have to be stored and another purchaser attempted to be found (SF 79). This did not mean that he had the order before he purchased the sugar from Aron & Co., as Mr. Shannon himself (SF 79) but instead points to the fact that Shannon legitimately buys sugar from Aron & Co. and, if he cannot recall it, has to stand whatever loss there may be on the declining market or in case the sugar is damaged (SF 79) and, of course, as was pointed out by the attorney for the Bureau of Inquiry and Compliance that even though the prospective purchaser's refusal to purchase did not cost Mr. Shannon anything extra (SF 80); still, as a matter of common sense—in a business where the market breaks rapidly and the commodity deteriorates quickly, the loss of a sale can mean a considerable loss since the cash representing the sales price is negotiable but many bags of sugar are not (SF 80). That the margin of profit in the sugar business is comparatively small and a reasonable profit for a sugar dealer in San Antonio on the date of the hearing, that is, March 1957, is 25 to 35¢ per 100 lbs (SF 69). Without waiving any objection respondents have made to the introduction of Exhibit No. 1, respondent would state that his profit as shown on such Exhibit of an average of approximately 35¢ per 100 pounds is merely the normal profit of a sugar [fol. 303] dealer wherein the figures contained on Exhibits Nos. 2 and 3 designating the freight rates are entirely dissimilar. Of course, the margin of profit would vary somewhat from the March 1957 date back into 1956, but there is no testimony that this variance was very much. In fact, Mr. Whitehead testified that he did not know what the margin of profit would be (SF 23). That sugar is a perishable commodity (SF 70) and has to be turned over rapidly to realize any profit at all, because it will deteriorate (SF 70) and has a very short profit (SF 70); that the cost of unloading sugar and storing it is comparatively high and eats into or completely causes to vanish any profit that those in the sugar business might make (SF 17). That the

price fluctuations in the sugar business are also quite drastic (SF 23 to 25) which again necessitates moving the item fast to avoid a possible loss. That it is necessary to sell sugar as quickly as possible to avoid this loss which, of course, is true in any mercantile business and yet, some items are more perishable than others (SF 24). Naturally Mr. Shannon tries to sell his sugar as quickly as possible because of the above reasons but, as above set out, he does not obtain orders for sugar and then purchases same but maintains a reasonable steady flow of sugar on his returning trucks from Louisiana. Also, as above stated, he may get the sugar sold as a truck is returning from Louisiana and then find that it is not sold. On occasion he will even send an empty truck over to Louisiana to load sugar (SF 16), but as a matter of common sense, it would be more profitable for him to be delivering some commodity that he was selling to Louisiana at the same time.

Be that as it may, when the sugar is returned to San [fol. 304] Antonio, some of it might be sold while the truck is returning inasmuch as Shannon knows something about what his customers generally would want. However, a considerable amount of sugar remains in the warehouse (SF 35, 36, 37). From this stored sugar frequent sales in less than carload lots are made (SF 77-78). Shannon has on occasion even stored sugar in commercial warehouses when his warehousing facilities because of the amount of sugar and other items on hand at that time were inadequate. However, because of the small margin of profit such a situation proved unprofitable (SF 36-37; SF 29-30). Also as to the sales included in Exhibit No. 1, to which respondents objected, because among other reasons same represented merely isolated sales of the parties, Mr. Whitehead admitted that the purchase and sale of sugar by Mr. Shannon was not limited to the individuals or companies listed on Exhibit No. 1, but simply that those persons did represent the principal purchasers from Mr. Shannon but not that all of the purchases that those particular purchasers made during the period covered in the exhibit were listed (SF 20). Although this point might have no direct relevance to the case it is pointed out, so that a complete

picture of the worth of Exhibit No. 1 may be brought to the attention of the Commission.

That there is no evidence in the record showing that there are any identifiable transportation charges made by the Shannons to the purchasers of the sugar, nor have the Shannons any basis or formula for accessing transportation charges but instead their sales are governed solely by the market price of sugar in San Antonio. There is no evidence in the record showing that the Shannons hold themselves out to the general public to haul sugar for any compensation.

[fol. 305] That Mr. Shannon sold almost all of the sugar to purchasers on credit (SF 37-38). These sales had been made on credit since the inception of Mr. Shannon's sugar business, that is, approximately three years (SF 41). That at the date of the hearing in March 1957, Mr. Shannon had more than $10,000.00 tied up in accounts receivable from purchasers of sugar (SF 41). That at times during 1956 he has had as much as $20,000.00 and $30,000.00 tied up in accounts receivable from sugar purchasers (SF 42). That any sugar on a truck on the date of taking inventory was carried in the inventory showing clearly that the sugar belonged to Shannon and he considered it his (SF 54). Of course, what is considered a large inventory varies depending on the business and a large inventory in the sugar business would be a considerably less inventory than would an inventory of more stable products where the market does not fluctuate nor the item deteriorate so rapidly.

Nowhere does Mr. Whitehead testify from his own knowledge but is merely quoting what Mr. Shannon and Mr. Wilcox said. The record as a whole should be inspected to determine what Shannon's true operations were and, as Mr. Whitehead said, Mr. Shannon very vehemently declares "that this is a legitimate business of his; that he is in the sugar business" (SF 16).

Alleged Errors in Report of Division 1, Interstate Commerce Commission.

Point of Error No. One. Division 1 of the Interstate Commerce Commission erred in finding and concluding that the transportation of the sugar by the Shannons is with respect to their primary business of buying and selling livestock and certain other commodities a related or secondary enterprise conducted with the purpose of profiting [fol. 306] from the transportation performed and as such constitutes for-hire carriage for which authority from the Commission is required.

Point of Error No. Two. Division 1 of the Interstate Commerce Commission erred, in finding and concluding that Emma Shannon and Richard J. Shannon, dba E. & R. Shannon, have been and are engaged in transportation in interstate commerce of sugar from Supreme, Louisiana, to points in Texas for compensation as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206 (a) and 209 (a) of the interstate commerce act and that an order should be entered requiring them to cease and desist from all such for-hire operations until appropriate authority is obtained from the Commission.

Argument and Authorities

Shannons would first submit that the introduction into evidence of the railroad and trucking freight rates from Supreme, Louisiana, to San Antonio, Texas, are completely irrelevant to any issue in this matter. In the case of the Commission vs. A. W. Stickle & Co. (128 Fed. 2d. 155), the rates were relevant because they show that the profit Stickle & Co. obtained for their sale of lumber was the same as the freight rate so that in effect all that Stickle & Co. was doing was obtaining money for freight under the guise of being in the lumber business. However, there are so many differences between the Stickle case and the matter at bar that it will be hard to list them all. But to discuss the one immediately at hand, obviously if the freight rate is considerably different from the average profit obtained by a man in the sugar busi-

ness then the freight rate itself has no application what-
[fol. 307] soever to a determination of whether or not such sugar merchant is actually in the trucking business. Of course, the 15 isolated sales introduced into evidence in Exhibit No. 1 are not conclusive of the operations of respondent Shannon and clearly apply to only a limited period but assuming for purposes of argument that they are conclusive, they are obviously the transactions selected by the Bureau of Inquiry and Compliance to prove their point; that there is a situation involved of a common or contract carrier as opposed to a private carrier. However, their own figures show that the average profit obtained is not the freight rate but far from it. Instead it is simply the reasonable profit of a sugar merchant in the locality where respondent Shannon operates. Obviously respondent Shannon does not raise sugar, so naturally the cost of hauling sugar is an important factor to determine his margin of profit, since he buys and sells sugar, but his storing costs, bookkeeping costs, bad debts, inventory losses, unloading costs, etc. are also important factors and just because hauling is an element of his costs does not mean by any stretch of the imagination that he is in the trucking business for hire.

Regardless of what one calls it, whether or not Shannon is in the trucking business would invariably boil down to the question of are his operations really a subterfuge; for although technically a finding along this line is unnecessary to hold that he is in the trucking business, still, as a practical matter, this question of subterfuge seems all important and unless all the evidence in the hearing is disbelieved, respondent Shannon respectfully submits that he is definitely and clearly a legitimate sugar mer-
[fol. 308] chant. How else could he be in the business of buying and selling sugar when he does not raise it? He buys sugar from a manufacturer, hauls it to his place of business taking title in his own name and bearing all the losses connected therewith; sells the sugar on credit with the attendant possibility of bad debt loss and in the interim period stores and inventories the sugar. What more could he do to be considered a legitimate sugar merchant? Is it necessary for him to haul by rail and pay

such costs when he has his own trucks available for hauling and has had them available over the years for his complete operation, starting with livestock and expanding over the years to feed stuffs, grain, corn, molasses, salt and sugar.

In the Stickle case there was a certain charge for hauling depending on where the customers were. There was practically no lumber in Stickle's inventory. In our case there was considerable sugar inventory considering the nature of the market in the sugar business and there are no definite charges made for hauling to various places. In fact there are no charges whatsoever made and no deliveries made but the only hauling is the bringing of the sugar from the manufacturer to Shannon's place of business. His charges do not vary with the delivery charge as in the Stickle case but instead his price for the sale of sugar varies strictly with the market for sugar. His entire profit comes from the buying and selling of sugar and it is brought only to San Antonio for sale and the question of transportation rates does not even enter into Shannon's charges. If his cost of hauling, plus the amount that he purchases the sugar for, plus the loading, unloading, storage, etc. amounts to more than the going price [fol. 309] in San Antonio, Shannon loses money. Also, in the Stickle case, the principal payroll of the company was tied up with the paying of truck drivers and the principal assets of the company were invested in transportation facilities. In Mr. Shannon's case the opposite is true. Less than 25% of his salaries are tied up with truck drivers and these truck drivers representing the less than 25% of the salaries paid, do not haul exclusively sugar but instead haul many other items including livestock, grain, salt, etc. Also the trucks used for hauling sugar are a small percentage of the total assets of the company and again these trucks are far from considered being used exclusively for the hauling of sugar.

Also the court in the Stickle case emphasized the fact that normally contracts were entered into to sell and transport the lumber to a certain purchaser before Stickle purchased the lumber from elsewhere. But in the matter at bar the opposite is true. It is also evident that sugar

is a much different commodity from lumber in that it is more perishable, is subject to greater market fluctuations and the margin of profit for sugar is smaller. Because of this it is necessary for a sugar merchant to sell his sugar quickly to prevent the possibility of a loss and for that reason an inventory of sugar would be considered greater, even though it did not have the same value in dollars and cents as an inventory in lumber, since it is not the practice of sugar merchants to keep large supplies of sugar on hand. Sugar must be sold quickly at a small profit, so that it would naturally behoove Shannon to sell his sugar as fast as he could, but even with this added factor involved, by his own testimony he still does not make it a practice to obtain an order for sugar and then purchases same but the contrary is true.

[fol. 310] To digress for a moment—as above set out in the Points of Error, respondent Shannon objected to the introduction of the three exhibits because they were irrelevant, but even if their admission should be allowed as going solely to the question of the weight to be given such exhibits, the weight given same should certainly be very small, since the relationship of the freight rates to the profit has no correlation whatsoever. Clearly, Shannon is not promising to deliver for everyone and should not be considered any less a merchant because he hauls the sugar to his establishment by his own trucks rather than paying someone else to do so. It would not seem that the intention of the Interstate Commerce Act was to extend to the case at bar and hold that in view of all of the circumstances Shannon was not a private carrier. Clearly he is. He has a mercantile business and sugar is merely one line of the business. This is also different somewhat from the Stickle case where the only item sold was lumber. Also Stickle had a freight bill with the name and location of the consignee on it, so all he was really doing was delivering, and the consignee had to deliver to the driver a check payable to Stickle for the amount of the transportation charge shown on the freight bill. In our case we have no consignee. We have a purchaser and there is no item of freight connected with the sales price in any way. Instead a sale is made at the market price on credit. As to respondent Wilcox, his

only interest in Shannon's operations is that Wilcox is a broker making a commission on any sale from J. Aron & Co. to Shannon so that the more Shannon buys from J. Aron & Co. the more commission Wilcox makes.

[fol. 311] . Division 1 of the Commission seems to give great weight to the fact that Section 203 (c) of the Act was amended in August, 1958, by the addition of the following language "nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purpose unless such transportation is within the scope and in furtherance of a primary business enterprise (other than transportation) of such person. Division 1 mentions that such amendment wrote into the Act the usual "primary business" test. In other words, that such amendment merely codified the prior case law. Division 1 then, however, seems to go a step further and decide that the amendment of the Act could transform a fact situation such as the case at bar from legitimate private carriage to illegal contract or common carriage. The Shannons submit that the Examiner was imminently correct in his finding "that under the 'primary business' doctrine such transportation constitutes private carriage". Certainly the Shannons are legitimately in the sugar business and the hauling thereof is private carriage.

Appended to the Division's report are both House and Senate Committee hearings concerning the amendment of such Act. An examination of such hearings is most important in the determination of the Committee's intent. Quoting from Appendix B of the Division report it is stated "Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost." It is obvious that what the Committee was attempting to correct by its recommended [fol. 312] amendment to the Act was the prevention of subterfuge in this field and the prevention of prearranged plans to prevent the real consignee receiving transportation at a reduced cost. It is also obvious that the Committee did not intend to recommend the passage of an amendment which was a bona fide merchandising venture such as in the case

at bar where the Shannons are legitimately in the sugar business, where the sale of sugar is part of their primary business enterprise, such item being one of many items that their usual dealership enterprise in San Antonio sells. Certainly, the buying and selling of sugar is no less secondary than the buying and selling of other items handled by the Shannons which have been admitted by all concerned to be a legitimate part of the primary business of the Shannons.

Both of the Committee hearings above referred to make it clear that it was not the intent of such Committees in their recommendation to Congress to change the "primary business test" set out in Brooks Transportation Co. v. United States, 340 U. S. 925. As stated in the House Report "there is no intention on the part of the Committee in any way to jeopardize or interfere with bona fide private carriage as recognized in the Brooks case. It was even suggested to the Committee that the definition of "private carrier" be changed. In response to this the Committee stated "During the committee's hearings on H. R. 5825, many witnesses expressed the fear that if the definition of a private carrier of property by motor vehicle was changed, it would open the door to reconsideration of the concept of the "primary business" test of private carriage as enunciated by the Commission in the Lenoir Chair case (51 M.C.C. 65 (1949)) and by the United States Supreme [fol. 313] Court in the Brooks case (Brooks Transportation Co. v. United States 340 U.S. 925 (1951)).

In the Brooks case, the Supreme Court recognized the so-called primary business test as the governing criterion in establishing bona fide private carriage. Under that doctrine, if transportation is performed in furtherance of the primary business of the operator, even though a charge may be made for such service, the transportation is treated as bona fide private carriage. If, however, a bona fide noncarrier business is not established, the transportation is treated as for hire.

This doctrine has been helpful to the bona fide private carriers. They are fearful that any amendment of the definition of "private carrier of property by motor ve-

hicle" may result in an unsettling of the "primary business" test and require them to embark upon another long series of litigation similar to that which culminated in the Brooks decision."

It is evident from all the committee reports that such committees did not have any intent to jeopardize in any way private carriage and the Shannons submit that the report of Division 1 in this matter does just that. The Shannons believe that such report reads more into the amendment of the Act then was ever intended by its passage by Congress. Certainly, Congress did not intend for individuals, such as involved in the case at bar, to be unable to buy and sell products including sugar when they are and have been for many years in the general mercantile business which is their primary business with sugar being one of several of their commodities bought and sold. There is no evidence whatsoever in the case at bar of "prearranged plans" set up in order that the real [fol. 314] consignee may receive transportation at a reduced cost. The Shannons believe that Congress made its intent when it refused to change the definition of "private carrier" but instead reiterated the fact that it wanted merely to codify the "primary business" test in the Brooks case.

To continue the Bureau in its brief in this matter listed certain cases and the Shannons would like briefly to discuss them.

First, to the case of *L. A. Woiteshek; Common Carrier Application;* 42 MCC 193 (1943); in quoting from that case the Examiner in his recommended report and order on page 4 states:

> "In short each case must be determined upon its own particular facts and neither the receipt of compensation for transportation identifiable as such, nor the existing of some noncarrier business to which the transportation may be incidental is *alone* conclusive."

Based on this holding the Examiner found the respondents to be private carriers and certainly the facts so indicate. Naturally, it is a question of fact to be determined in each

case separately as to whether or not there is private carriage and as the Examiner has found *from the evidence* respondents have been in business for almost 23 years and never engaged in any important truck operations. That they have a storage facility only in San Antonio and maintain inventories of sugar from which many small sales are made. That only a small portion of the assets of the company are tied up in transportation facilities. That there are no identifiable transportation charges made by respondents to the purchasers of the sugar. Respondents have no basis or formula to determine transportation charges but instead the sales are governed by the market price of sugar in San [fol. 315] Antonio. That respondents do not hold themselves out to the general public to haul sugar for compensation nor was it conclusively shown that respondents transported sugar to sell specific individual orders. That instead respondents are engaged in a bona fide business of buying and selling many items including sugar and that under the very "primary business doctrine" test described in the *Woiteshek* case respondents are private carriers.

In the *Brooks Transportation Company, Inc.* vs. *U. S.* 93 F. Supp. 517 and 340 U. S. 925, which affirmed *Lenoir Chair Company, Contract Carrier Application* 51 MCC 65 (1949) there does not seem to be any other conclusion after reading such case than to affirm the opinion that the Examiner has reached in the case at bar. Clearly, in the opinion of respondents, the fact situation there presents a stronger case for the Bureau than in the case at bar yet there private carriage was found. In the *Brooks* case there were actual deliveries to the customers. Here the only transportation is in bringing the goods for purposes of sale to respondents' place of business. Also there is a charge for transportation there included in the selling price but still the holding was private carriage. Here there is no charge for transportation because actually there are no deliveries, the only transportation being respondents bringing the goods back to San Antonio so that they may be sold. Attention is called to the case of *Interstate Commerce Commission* vs. *Tank Car Oil Corporation* cited in the

Brooks case, 151 F. 2d 834 (CCA-5th Circuit; 1945) where the Court says:

> "We think that Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in the furtherance of his own commercial enterprise he is a private carrier, and, therefore, not subject to the provisions of the Act."

[fol. 316] The only other case cited by the Bureau is the *Dayhoff* case 8 FCC 32227. From the quotation from the case found on pages 7 and 8 of the Bureau's exceptions it is clear that the fact situations are different in that case and in the case at bar. There, no inventory was kept and the sand was purchased only after receipt of an order and then only to fill that order. Also the major portion of the assets of the company were tied up in motor facilities.

Although the cases seem to indicate that all the facts must be examined for a proper determination of whether or not there is private carriage, the Bureau in its brief seems to believe that the only test is whether or not the profit obtained by the merchant is less than the freight rate of an independent carrier and if so, automatically the merchant is not a merchant at all, but instead is in the transportation business; and this is so even though he has been a merchant for years buying and selling many items of which sugar is only one. Respondents submit that the freight rates are irrelevant in the case at bar. They would certainly have some weight if it were shown that the freight rate was the same as the profit made on the buying and selling of sugar, for then it would appear that the profit obtained was merely for transporting the goods; but when there is no relation whatsoever between the profit obtained and the freight rates, but instead the profit merely varies with the market for the product, it would seem that the freight rate then becomes unimportant. It would seem unusual to say the least, that respondents could bring salt and molasses in their trucks and because they make a larger profit on them they are merchants, but because they hap-
[fol. 317] pen to bring sugar in their trucks and the profit margin is smaller that they then are transformed into mem-

bers of the transportation business. In the case at bar respondents are a general merchant handling many products including sugar, which is one of his departments. It would certainly seem strange that if he took on a new line that he could make a large profit on, larger than the freight rate from the place that he purchased the goods to San Antonio, that he is not a common carrier, but because the market price of sugar is lower because possibly it is raised in this part of the country and is easier to obtain, that automatically respondents become transporters. And on close analysis this definitely seems to be the Bureau's argument for their principal, if not, their only contention is that respondents are transporters, not merchants, because of the fact that their margin of profit is less than the freight rate. It would seem to be a factor in determining that respondents were in the transportation business, if for example, they owned a barber shop which was their primary business and then bought a truck that they used to bring a few types of hair oils to their shop but mainly to bring sugar to San Antonio. Here obviously their sugar business is completely unrelated to their main business and their sugar business would necessarily be closely scrutinized, but it is certainly a factor in respondents favor when it is shown that they have been merchants for years slowly expanding their lines to now include, livestock, grain, feed stuffs, salt, molasses, and sugar. Clearly respondents are merchants and nothing else. Also the buying and selling of sugar necessarily entails not only transportation costs but storing costs, collection costs, bookkeeping costs, etc., so that the entire [fol. 318] assets of the business must each bear its proportionate share of the costs as is the case in all mercantile business where similar, but not the same, items are sold.

Respondents would call attention to page 15 of the Bureau's exceptions where the Bureau states:

> "It is further evident from this fact and the close proximity of the dates of purchase, loading and delivery, that it was customary for Shannon to have orders from prospective purchasers prior to its purchase of the sugar."

Respondents submit that this statement points the whole question involved in this matter. Shannon testified that he had no such agreements (SF 79) but in spite of this the Bureau believes that Shannon is not telling the truth. In other words, it simply boils down to the fact question, is Shannon a legitimate business man in the sugar business as well as handling many other lines in a general mercantile business, or is he not? Does he really consider himself a sugar merchant buying and selling sugar with the market and attempting to make a profit, or is he not? What else can this question be but a question of fact; and respondents submit that the Examiner who was personally present, heard all of the evidence and the testimony, and after considering same, believed Shannon and found that from all of the facts Shannon intended to be a merchant including the merchandising of sugar and did in fact merchandise sugar bona fidely and legitimately. There is actually no evidence to the contrary.

On page 16 of the Bureau's exceptions the Bureau attempts to show that respondents handled sugar differently from its operation of its other activities. Respondents except to this statement by the Bureau. In the first place re- [fol. 319] respondents store all the sugar that it is necessary for them to have on hand taking into consideration availability of storage space, perishability of sugar, etc. Also they use their trucks to transport other items than sugar, and in fact only 3 of the 7 trucks are ever used for transporting sugar (SF 59-60) so that it is definitely in keeping with their business to use trucks for transporting their various types of merchandise. They use them all the time. They do not use rail or common motor carriers to transport the sugar from Louisiana because they can obtain all the sugar they need in their own trucks and obviously the cost is prohibitive. Respondents take issue with page 17 of the Bureau's exceptions discussing the assets of the business. The costs of the sugar part of the business is definitely tied into all or almost all of the assets of the business. There is bookkeeping and office expenses necessarily incident to the purchase and sale of sugar; collecting accounts for sugar requires collection expense which could

include automobile travel to the purchasers of the sugar to collect the money for it and originally contacting those persons possibly in person by automobile to try to sell some sugar. Even the cottage that is mentioned in the Balance Sheet was testified to be taken in for a bad debt (SF 46). The record does not state whether that was a bad debt for a sugar debt or not but inasmuch as a substantial portion of the accounts of the business related to accounts for sugar certainly there is a good chance that the cottage mentioned in the Balance Sheet represented payment for sugar, so that even this item could relate to the sugar phase of the business and shows the inter-relation between the various phases of the business and the fact that this is a mercantile [fol. 320] business with many departments, one of which is sugar, and none of which can be completely segregated from the others. On page 18 of the Bureau's exceptions a discussion is made concerning the sales on credit. Respondents submit that the credit sales are significant even though respondents receive the same credit terms from the sugar refinery as it allows its ultimate purchasers, because even though the discount is on a time basis, since the sugar is purchased first the money is due first to the refinery, and also if the persons to whom respondents sell the sugar do not pay, respondents are still liable to the refinery for the entire purchase price from the refinery, and respondents assets are subject to execution to satisfy that indebtedness.

Requested Finding

Respondents Shannon request that the Interstate Commerce Commission find that they are in the business of buying and selling sugar at a profit and that as such their transportation of sugar to San Antonio in their own trucks after the purchase of same from a sugar manufacturer or other sugar dealer without the obtaining of a permit of the Interstate Commerce Commission for them to operate as a common or contract carrier is not violating any of the provisions of the Federal Statutes and more particularly the Interstate Commerce Act or the regulations of the Interstate Commerce Commission, but instead that as to such

operations respondents Shannon are a private carrier as defined in the Interstate Commerce Act.

Conclusion and Prayer

Wherefore, in view of the above, the Shannons respect- [fol. 321] fully submit that the facts in this case clearly support the Examiner's findings and report and recommended order and that the Shannons are not in violation of any of the provisions of the Interstate Commerce Act or the regulations of the Interstate Commerce Commission, but instead the Shannons are private carriers and as such are operating legitimately. That the Honorable Interstate Commerce Commission should reconsider the report of the Commission by Division 1 and after such reconsideration should hold that the Points of Error Nos. 1 and 2 briefly set out in this petition are in fact errors made by Division 1 in its report and that same should be reconsidered and corrected so that the report of the Interstate Commerce Commission should be that Emma Shannon and Richard J. Shannon dba E. & R. Shannon be held to be not in violation of any of the provisions of the Interstate Commerce Act, or the regulations of the Interstate Commerce Commission, but instead that they are legitimately operating as bona fide private carriers and that the investigation as to them should be discontinued and the previous order ordering them to cease and desist should be cancelled, set aside and held for naught.

Respectfully submitted,

Walter C. Wolff, Attorney for Respondents, James K. Building, 417 South Main Avenue, San Antonio, Texas.

[fol. 322] Proof of Service (omitted in printing).

[fol. 323]

BEFORE THE INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION
Washington, D. C.

No. MC-C-2055

EMMA SHANNON AND OTHERS, INVESTIGATION OF OPERATIONS

ORDER OF AUGUST 3, 1959[1]

NOTICE TO THE PARTIES—September 17, 1959

The outstanding order in the above-entitled proceeding not yet having become effective, and an appropriate petition for reconsideration of such order, by respondent, having been filed on September 8, 1959, such order insofar as it relates to No. MC-C-2055 is stayed pursuant to section 17(8) of the Interstate Commerce Act, pending disposition of the matter.

Harold D. McCoy, Secretary.

[fol. 327]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-2055

In the Matter of

EMMA SHANNON and RICHARD J. SHANNON, doing business as E. & R. SHANNON

and

J. T. WILCOX, doing business as WILCOX BROKERAGE COMPANY—

INVESTIGATION OF OPERATIONS

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[1] The lead number of this report is No. MC-C-1994, *Fracring Brokerage Company, Inc., Investigation of Operations.*

REPLY OF BUREAU OF INQUIRY AND COMPLIANCE TO PETITION FOR RECONSIDERATION—Filed September 25, 1959

To the Honorable Interstate Commerce Commission:

Nature of Proceeding:

The titled proceeding, No. MC-C-2055, Emma Shannon and others—Investigation of Operations, was consolidated with *No. MC-C-1994, Fraering Brokerage Company, Inc., Investigation of Operations*, by Division 1, for the purpose of reporting its decision with respect to both investigation [fol. 328] proceedings. The Report and Order, dated August 3, 1959, and served August 11, 1959, found Respondents Shannons and Fraering Brokerage Company, Inc., to be engaged in the transportation of sugar as for-hire carriers without appropriate authority. Fraering procured an extension of time for filing its petition for reconsideration. This replies to the petition filed by the Respondents Shannons.

Preliminary Statement

The pertinent facts have been treated twice by both Respondents Shannons and the Bureau of Inquiry and Compliance in briefs and on exceptions. In particular, the Commission is respectfully referred to the Exceptions to the Examiner's Report by the Bureau and the Report of Division 1. It is unnecessary to burden this record with another review of the facts; however, certain preliminary comments seem appropriate regarding the Petition for Reconsideration.

The points of error in the Petition for Reconsideration generally complain of ultimate conclusions of the Division; however, the arguments of Respondents relate only to contentions heretofore urged by the Bureau and do not specify [fol. 329] error with respect to findings of fact upon which the Division reached its conclusions. In this respect, statements and complaints regarding the facts of the case in the Petition for Reconsideration could be misleading. To illustrate what is meant: Respondents attack a contention heretofore made by the Bureau that the evidence reflects purchases and sales of sugar were made in fulfilment of pre-existing orders. (Petition 22). This was unnecessary;

the Division found on Sheet 16 that "The more usual arrangement under which they operate, however, appears to be one in which the Shannons have *no* pre-existing order, but buy with the intention of selling later either en route or after the transportation is accomplished."

Also, there is a lengthy discussion by Respondents complaining of the Bureau's evidence showing that Respondents realized gross profits from the transportation and sale of representative shipments of sugar substantially less than minimum freight charges of common carriers applicable to the transportation of such shipments. Respondents infer that the Bureau predicated its position entirely on such evidence. (Petition 20). This is not true. The [fol. 330] Bureau says the evidence is pertinent but it has contended that a salient factor in the determination is the purpose for which the transportation is performed. Certainly, there is nothing in the Division's discussion of the case to warrant the assumption that the decision rests entirely on this one fact.

In addition, the claim of Respondents that their profit from the sale of sugar is the normal profit of sugar merchants (Petition 6 & 7) is not true. The Bureau adequately covered this point under Exception No. 3, pages 18 through 20 of the Bureau's Exceptions to the Examiner's Report, on file herein. Also, the Division relates the distinction between the 35 cents per 100 pounds normal profit of sugar dealers in San Antonio *over and above* costs of transportation, as compared with Respondents' average gross profit of 35 cents per 100 pounds *less* costs of operating vehicles more than 500 miles one way. [Sheets 9 & 10]. The conclusion of Respondents that a considerable amount of sugar is warehoused (Petition 8) is unfounded in fact. The Bureau's discussion at page 14 of its Exceptions to the Examiner's Report points out that "inventory" and "storage" were not synonymous. Respondents inventoried sugar which was often on vehicles moving from the refinery and sold off the truck.

[fol. 331]

Reply to Points of Error Nos. 1 and 2

The finding of the Commission, Division 1, that Respondents Shannons are engaged in the sugar dealings as a related or secondary enterprise with the purpose of profiting from the transportation performed and, as such, they are engaged in the for-hire carriage of sugar as a common or contract carrier, is eminently correct and well supported both in fact and in law.

Argument and Authorities

Transportation performed as a related or secondary enterprise with the purpose of profiting thereby is inherently antagonistic to bona fides private carriage.

The "primary business doctrine," the established test in determining the status of persons engaged in the transportation of property to which they have taken title under buy and sell arrangements, was incorporated into law by amendment to Section 203(c) of the Act as follows:

> . . . nor shall any person engaged in any other business enterprise transport property by motor vehicle in in-
> [fol. 332] terstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance of, a primary business enterprise (other than transportation) of such person.

A committee analysis of the above-quoted amendment in the Congressional Record of June 11, 1958, reads in part:

> This amendment is designed to prevent the use of private, unregulated motor carriers in commercial transportation. These practices usually involve such devices as a private carrier purchasing commodities and then selling them at the other end of the line, when in fact the carrier is actually only transporting the goods similar to a common carrier; or a private carrier transports its own goods to market and then

purchases commodities for the return trip in order to avoid an empty haul. . . .

Reports[1] of Congressional Committees relating to the amendment more specifically denounce the buy and sell practices of private carriers which result in the evasion of the economic provisions of the Act. A portion of Senate Report No. 1647 reads:

> The one most commonly used is the so-called buy-and-sell method of operation, involving the issuance of [fol. 333] bills of sale, invoices, and other such instruments to make it appear that the commodities being transported are those of the vehicle owner when in fact the transaction is merely a device to provide transportation for hire without a certificate or permit and without payment of the transportation tax. *Another is the backhaul method of operation increasingly engaged in by concerns that deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or where they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.* (emphasis supplied)

Even prior to the amendment of Section 203(c), this Commission and the courts recognized the following two principles of law: (1) A person may be engaged in more than one business, one of which may be a bona fide trade and the other a motor carrier operation for hire. Stated another way, where, as here, the operator is principally engaged in some noncarrier commercial enterprise, it then must be determined whether the operations in issue are in

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[1] Senate Report No. 1647 of the Committee on Interstate and Foreign Commerce.
House Report No. 1922 of the Committee on Interstate and Foreign Commerce.

bona fide furtherance of the primary business or conducted as a related or secondary enterprise with the purpose of profiting from the transportation. *Lenoir Chair Company* [fol. 334] *Contract Carrier Application*,[2] 51 MCC 65, aff. *Brooks Transportation Company, Inc.*, v. *United States*, infra; *No. MC-117308, Roy D. Yiengst Common Carrier Application*, —— MCC —— (Division 1, November 5, 1958); *Roy J. Vollbracht Contract Carrier Application*, 76 MCC 761. (2) And, in making the determination whether the transportation is in bona fide furtherance of a trade or for-hire carriage, the most significant factor to be considered in the purpose or motive of the operator for engaging in the transportation. *Brooks Transportation Com-* [fol. 335] *pany, Inc., et al.*, v. *United States, et al.*, 93 F. Supp. 517, aff., *per curiam*, 340 U. S. 925. In that case, the lower court, speaking of the primary business doctrine, stated at page 525:

> . . . And, in the application of this test, the *motive to profit by the carriage* and the relationship of the

[2] In the *Lenoir Case*, The Commission stated in part:

> The facts in a given case may show (1) that a concern is engaged in a non-carrier business primarily and that as an incident thereto is transporting property in a bona fide effort to further the primary business and not with any purpose of profiting from the transportation as a separate and distinct enterprise; or (2) *that a concern, engaged primarily in a non-carrier business, is also engaged in a related or secondary carrier business supplying transportation for compensation with a purpose to profit from the transportation charge, even though it may be the producer of the goods, their owner while in transit and may be transporting them for the purpose of sale.* Thus, although the Woitishek decision states that the for-hire or private carrier status of one who engages in transportation shall be determined on the basis of the primary business, *it recognizes that a concern may be engaged primarily in a mercantile or manufacturing enterprise of very substantial size and yet so conduct its comparatively much smaller motor operations as to support a finding that such operations are not primarily in furtherance of the main or principal business but are for-hire carriage performed with a purpose to profit from the transportation as such in the same manner as does a for-hire carrier.* (emphasis supplied)

carriage to the business involved are important elements. (emphasis supplied)

Respondents argue that their operations more closely resemble those of a private carrier than the operations of Lenoir and Schenley in the *Brooks Case*, supra, and that since the latter operations were held to be private carriage the Commission should likewise hold Respondents' opera- [fol. 336] tions to be private carriage. (Petition 19). However, Respondents misunderstand the significance of the *Brooks Case*. The operations of Lenoir and Schenley were found to be private carriage, despite the fact that each transported products for transportation charges separately assessed and computed at prevailing rates of common carriers, because the transportation was not performed with a purpose to profit thereby, although some profit must certainly have accrued from the charges as computed. In that case, a finding that the transportation was not performed with the purpose to profit overrode facts which might otherwise establish a for-hire motor carrier operation. Contrariwise, transportation performed with a purpose to profit thereby, although certain facts of the operation are indicative of a private carrier operation, is for-hire carriage.

Briefly, the facts of the *Brooks Case* were as follows: Lenoir is a furniture manufacturer having an annual production approximating $3,000,000, of which only 15% to 20% is transported on its own trucks. Lenoir made all its sales f.o.b. its factory, and when it delivered the furniture in its own vehicles it added to the factory price a charge [fol. 337] comparable to the charges of the rail and motor carriers used by it to haul to the same destinations. *The court specifically found that "This is done in order that the delivery price at destination will be the same whether the furniture moves in [Lenoir's] vehicles or is transported by a carrier for hire, and also 'so as not to be unfair competition to any other carrier.'"*

The Schenley facts are similar except that its business is the manufacture of alcoholic beverages. The small percentage of beverages hauled in Schenley's own trucks have

charges added to their f.o.b. factory price, which charges are comparable to carrier for-hire charges. *This also was done in order to have uniformity of price and to avoid unfair competition to the regulated carriers.*

Here, beyond question, Respondents Shannons engage in the transportation of sugar for the purpose of providing lading for their vehicles. In the light of the authorities and the legislative history of the amendment to Section 203(c) the Division is eminently correct in concluding that the transportation was performed with the purpose to profit [fol. 338] and, as such, is for-hire carriage subject to the economic provisions of Part II of the Inter tate Commerce Act.

Respondents are not engaged in the transportation of sugar in furtherance of the merchandising of sugar.

The testimony of Mr. Shannon, under cross-examination, at pages 82 and 83 of the Record reads:

Q. Well, you stated you could send an empty truck up to Supreme, Louisiana and haul it back for a profit.

A. Yes, sir.

Q. In other words, you don't need to back haul sugar for a profit?

A. What is that?

Q. You don't need—you could operate without any other business, *you could send empty trucks up to Supreme, Louisiana right now, and haul sugar back and make a profit on the sale of sugar in San Antonio at the price sugar is selling for now in San Antonio?*

A. *No, I do not.*

Q. *Oh, you couldn't?*

A. *No, I couldn't do that.*

. . .

. . .

Q. But in order to make that profit on the backhaul of sugar you would have to have something going up to Louisiana, would you not, as you stated you couldn't empty truck it up?

A. That's right.

[fol. 339] The Record further discloses that the amount received by Shannon from its customers in excess of what it pays the sugar refinery averages 35.7 cents per hundred pounds. The transportation of sugar by rail, in carload lots, would have cost Shannon 69 cents per hundred pounds, approximately double the amount actually realized from the sale of sugar. Rates assessed by motor carriers for services comparable to that performed by Shannon amounted to 109 cents per hundred pounds for sugar moving in truck load lots, or, more than three times the amount realized by Shannon from its sales. If, as in its other activities, Shannon were to employ for-hire carriers to augment its transportation of sugar, Shannon would be faced with insurmountable losses.

Shannon contends that it is a "sugar merchant" and so urged in its briefs heretofore submitted. However, the uncontroverted evidence is that Shannon cannot profitably engage in the sale of sugar, even when employing its own vehicles to transport the commodities. Actually, Shannon would not be interested in handling sugar except for the fact that it has vehicles, loaded with livestock and feed-[fol. 340] stuffs, moving in the direction of Supreme, Louisiana. It is obvious that Shannon, by its sugar activities, purposes primarily to procure transportation for its vehicles which would otherwise return empty. The transportation is not conducted incidental to and in furtherance of the sale of sugar; on the contrary, the buying and selling of sugar is intended to afford employment for its vehicles.

It appears that Respondents, throughout their argument, assume that their primary business includes the merchandising of sugar and that the transportation of sugar is in furtherance thereof. Actually, this is the issue and not a conceded fact. At page 11 of the Petition, Respondents say they are clearly legitimate sugar merchants, and at page 12 ask:

> How else could he be in the business of buying and selling sugar when he does not raise it? He buys sugar from a manufacturer, hauls it to his place of business taking title in his own name and bearing all the losses connected therewith; sells the sugar on credit with the attendant possibility of bad debt loss and in the

> interim period stores and inventories the sugar. What more could he do to be considered a legitimate sugar merchant?

It is well established that neither the fact that the technical title to the goods is in the transporter nor the fact [fol. 341] that the transporter assumes risks of damage or loss is controlling in determining the status of the operation. *A. W. Stickle & Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155; *C. R. Scott* v. *Interstate Commerce Commission*, 213 F. 2d 300.

At page 22 of the Petition, Respondents ask:

> In other words, it simply boils down to the fact question, is Shannon a legitimate business man in the sugar business as well as handling many other lines in a general mercantile business or is he not? Does he really consider himself a sugar merchant buying and selling sugar with the market and attempting to make a profit, or is he not?

Respondents' protestation that they really consider themselves a sugar merchant is not the basis upon which determinations of this nature are made. Furthermore, the beliefs of the Respondents in this respect do not comport with the facts which show that they deal in sugar for a purpose which is wholly different from that of their livestock and feed business.

[fol. 342] Conclusion

The Bureau submits that the points of error are without merit and that the findings and conclusions of the Commission, Division 1, are correct.

Respectfully submitted,

Ellis V. Gregory, Interstate Commerce Commission, Washington 25, D. C.;

William W. Guild, Interstate Commerce Commission, 816 T & P Building, Fort Worth 2, Texas, Attorneys for the Bureau of Inquiry and Compliance.

[fol. 343] Certificate of Service (omitted in printing).

[fol. 344]

BEFORE THE INTERSTATE COMMERCE COMMISSION

ORDER—April 5, 1960

No. MC-C-1994

FRAERING BROKERAGE COMPANY, INC.,
INVESTIGATION OF OPERATIONS
(New Orleans, La.)

No. MC-C-2055

EMMA SHANNON AND OTHERS,
INVESTIGATION OF OPERATIONS
(San Antonio, Tex.)

Upon consideration of the records in the above-entitled proceeding, and of:

(1) Petition of Fraering Brokerage Co., Inc., respondent in No. MC-C-1994, filed September 30, 1959, for reconsideration;

(2) Joint petition of Emma Shannon and Richard J. Shannon, respondents in No. MC-C-2055, filed September 8, 1959, for reconsideration;

(3) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed October 16, 1959, to the petition in (1) above;

(4) Reply by Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed September 25, 1959, to the petition in (2) above;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

It is ordered, That the order of August 3, 1959, as indefinitely postponed with respect to statutory effective and

compliance date, be and it is hereby, reinstated, and the statutory effective and compliance date is hereby fixed as May 23, 1960.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 345]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-C-2055

EMMA SHANNON AND RICHARD J. SHANNON DOING BUSINESS AS E. AND R. SHANNON, ETC. —INVESTIGATION OF OPERATIONS

ORDER—June 1, 1960

Postponement of the Effective Date of Order

Present: John H. Winchell, Chairman, to whom the above matter, which is the subject of this order is assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of the institution of an action in the United States District Court for the Western District of Texas entitled *Emma Shannon and Richard J. Shannon, doing business as E. & R. Shannon* v. *United States et al.*, seeking to set aside the report and order of Division 1 entered August 3, 1959, in the above-entitled proceeding; and good cause appearing therefor;

It is ordered, That the effective and compliance date of such order, insofar as it is directed to Emma Shannon and Richard Shannon, doing business as E. & R. Shannon, be, and it is hereby, postponed from May 23, 1960, until further order of the Commission.

Dated at Washington, D. C., this 1st day of June, A. D. 1960.

By the Commission, Chairman Winchell.

Harold D. McCoy, Secretary.

(Seal)

[fol. 347]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 2840

[Title omitted]

MOTION OF CERTAIN RAILROADS FOR LEAVE TO INTERVENE ON THE SIDE OF DEFENDANTS—Filed November 28, 1960

The following named railroad companies move for leave to intervene in this action, on the side of the defendants, under section 2323, Title 28, U.S. Code:

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Elgin Joliet and Eastern Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; The Minneapolis & St. Louis Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; Wabash Railroad Company; The Western Pacific Railroad Company.

[fol. 348] Movants are corporations and are interested in the questions decided by the Interstate Commerce Commis-

sion which are involved in this action. Movants are common carriers by railroad carrying or participating in the carriage of sugar and other commodities originating or terminating in the area of the operations of the plaintiffs which were found to be unlawful by the Commission. Participation of movants will not broaden the issues or delay the trial and submission of this action.

Attached hereto is a proposed answer setting forth the defense for which intervention is sought.

Memorandum in Support of Motion

The Commission held that plaintiffs were engaged in the unlawful transportation of sugar by motor vehicle from points in Louisiana to points in Texas and ordered plaintiffs to cease and desist. *Emma Shannon et al., Investigation of Operations*, 81 M.C.C. 337 (1959). The intervening railroads include railroads carrying sugar between such points and railroads receiving sugar by interline from railroads serving such points. The railroads are thus competing with plaintiffs' unlawful transportation of sugar and are interested parties within section 2323. *Alton Railroad Co. v. United States*, 315 U. S. 15, 19 (1942).

Respectfully submitted,

Amos M. Mathews, James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois,

Boyle, Wheeler, Gresham, Davis & Gregory, By Bond Davis, 2100 National Bank of Commerce Building, San Antonio 5, Texas, Attorneys for Movants.

[fol. 349] [File endorsement omitted]

[fol. 350]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
C.A. No. 2840

EMMA SHANNON and RICHARD J. SHANNON d/b/a E. AND R. SHANNON, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER ALLOWING INTERVENTION OF CERTAIN RAILROADS ON THE SIDE OF DEFENDANTS—November 28, 1960 and Entered November 29, 1960

Before Brown, Circuit Judge, and Rice and Hannay, District Judges.

The Motion of certain railroads for leave to intervene on the side of defendants having been presented to members of the Court in chambers, it is hereby Ordered that leave to intervene shall be Granted subject to all legal objections which are reserved until the final hearing; briefs shall be filed within the time heretofore fixed.

November 28, 1960

Enter: (Illegible)

[fol. 351] [File endorsement omitted]

[fol. 386]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Civil Action No. 2840

[Title omitted]

PLAINTIFFS' TRIAL AMENDMENT—Filed September 22, 1961

To the Honorable Judge of Said Court:

Now come the plaintiffs in the above styled and numbered cause, and with leave of court first had and obtained, file this their trial amendment and for same would show unto the court the following:

1.

That in paragraph 5 cumulative of the seven reasons set out that the report and order of the Interstate Commerce Commission are unlawful and void there should be added thereto the following three reasons to be numbered 8 through 10.

8. That the conclusion that plaintiffs are either a common carrier or a contract carrier is too indefinite to satisfy the requirements of the Administrative Procedure Act or due process.

9a. That there are no findings of fact in the record to support a conclusion that plaintiffs are a common carrier.

9b. That there are no findings of fact in the record to support a conclusion that plaintiffs are a contract carrier.

10a. That there is no evidence in the record which would support the findings essential to a conclusion that plaintiffs are a common carrier.

10b. That there is no evidence in the record which would support the findings essential to a conclusion that plaintiffs [fol. 387] are a contract carrier.

Wolff & Wolff, By Walter C. Wolff, Jr., Attorneys for Plaintiffs, 417 South Main Avenue, James K. Building, San Antonio, Texas.

[fol. 388] [File endorsement omitted]

[fol. 390]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
San Antonio Division
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON
D/B/A E. & R. SHANNON

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

INTERVENORS

RED BALL MOTOR FREIGHT, INC., DENVER-AMARILLO RED BALL MOTOR FREIGHT, INC., BROWN EXPRESS, INC., CENTRAL FREIGHT LINES, INC., TEXAS-ARIZONA MOTOR FREIGHT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., TEXAS TANK TRUCK CARRIERS ASSOCIATION, INC., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO GREAT WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ELGIN JOLIET AND EASTERN RAILWAY

COMPANY, GREAT NORTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, WABASH RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY

For Plaintiffs

Wolff & Wolff, James K. Building, 417 South Main Avenue, San Antonio, Texas.

[fol. 391]
For Defendants

Mr. Ernest Morgan, United States Attorney, Western District of Texas;

Mr. John H. D. Wigger, United States Department of Justice, Washington, D. C.;

Mr. Fritz R. Kahn, Interstate Commerce Commission, Washington, D. C.

For Intervenors

Mr. Roland Rice, 618 Perpetual Building, Washington, 4, D. C.;

Mr. Phillip Robinson, 401 Perry-Brooks Building, Austin, Texas;

Mr. Charles D. Mathews, Mr. James H. Keahey, 1020 Brown Building, Austin, Texas;

Mr. Amos M. Mathews, Mr. James W. Nisbet, 280 Union Station Building, Chicago, Illinois;

Mr. Charles E. Crenshaw, Perry-Brooks Building, Austin, Texas;

Boyle, Wheeler, Gresham, Davis & Gregory, National Bank of Commerce Building, San Antonio, Texas.

Three Judge Court

John R. Brown, United States Court of Appeals, Fifth Circuit, Ben H. Rice, Jr., United States District Court, Western District of Texas, Joe M. Ingraham, United States District Court, Southern District of Texas.

OPINION—April 24, 1963

RICE, Judge

This action is brought against the United States and the Interstate Commerce Commission, pursuant to the [fol. 392] United States Code, Title 28, Sections 1336, 1398, 2284, and 2321-2325, to enjoin, annul, and set aside orders of the Interstate Commerce Commission issued in Docket No. MC-C-2055, *Emma Shannon and others, Investigation of Operations,* holding that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U. S. C. 306(a) or 309(a), and requiring plaintiffs to cease and desist from conducting such unlawful transportation.

This Court has jurisdiction of this cause and there is no question as to venue.

Pursuant to the United States Code, Title 28, Section 2323, intervenors were given leave to intervene in this cause.

By an order dated November 5, 1956, Division 1 of the Interstate Commerce Commission instituted an investigation under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), into the activities of plaintiffs for the purpose of determining whether plaintiffs were engaged in transportation of property by motor vehicle as a common or contract carrier without requisite authority, in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act, 49 U.S.C. 306(a) or 309(a). The matter was referred

to an examiner and a hearing was held on March 29, 1957, in San Antonio, Texas.

On August 29, 1957, the report and recommended order of the Examiner was served upon the parties, wherein the Examiner found that the motor carrier operations conducted by plaintiffs were not in violation of the Interstate Commerce Act, and recommended that the proceedings be [fol. 393] discontinued. Exceptions were filed by the Commission's Bureau of Inquiry and Compliance.

On August 3, 1959, Division 1 of the Interstate Commerce Commission found that while the statement of facts in the Examiner's report was adequate in all material respects, that said Examiner was in error as to his conclusions with respect to the nature of the transportation conducted by plaintiffs and the lawfulness thereof. It thereupon refused to adopt the Examiner's recommended order, but instead found that the plaintiffs were engaged in the unauthorized transportation of sugar in violation of the Interstate Commerce Act, and ordered plaintiffs to cease and desist from continuing such unlawful carriage. The Commission denied plaintiffs' petition for a rehearing and on April 5, 1960, ordered plaintiffs to cease and desist said unlawful carriage on or before May 23, 1960, and plaintiffs thereupon instituted this suit.

The basic facts in this proceeding are relatively uncomplicated. Plaintiffs are in the business of buying and selling livestock, in the feed mill business, and also buy and sell corn, oats, wheat, bran, molasses, sugar, salt, fertilizers, and everything in the feed line. Plaintiffs have been in business since about 1934, gradually increasing the number of items bought and sold with sugar being added as a saleable item about the year 1954. The large percentage of plaintiffs' assets are not composed of transportation facilities, nor do the salaries of truck drivers used to drive the trucks that from time to time haul sugar compose as much as twenty-five percent of plaintiffs' average weekly payroll. Plaintiffs purchase sugar in Louisiana in their own name, and haul same to San Antonio, Texas, in their own trucks, are fully responsible for same in the event of its [fol. 394] damage or loss in value because of price fluctua-

tions prior to the sale thereof, and maintain a reasonable inventory of sugar at their place of business in San Antonio. Plaintiffs sell sugar on credit and have sizeable amounts of accounts receivable owed by sugar purchasers. There is no evidence in the record showing that there are any identifiable transportation charges made by plaintiffs to the purchasers of sugar, nor have plaintiffs any basis or formula for assessing transportation charges. There is no evidence in the record showing that plaintiffs hold themselves out to the general public to haul sugar for any compensation, nor that it is plaintiffs' general practice to obtain orders for sugar from its customers prior to purchasing same in Louisiana. The record clearly indicates that plaintiffs are in a general mercantile business buying and selling many items, including sugar.

There is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions, nor is there substantial evidence in the record to indicate that plaintiffs have been and are engaging in transportation, in interstate commerce, of sugar as a common or contract carrier by motor vehicle without appropriate authority, in violation of sections 206(a) or 209(a) of the Interstate Commerce Act. In so finding and concluding the Interstate Commerce Commission arbitrarily exceeded its legal authority and defendants should be permanently enjoined from enforcing the terms of said order of April 5, 1960, which required and requires plaintiffs to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain, jointly and severally, from all operations in interstate or foreign commerce found in the [fol. 395] above described report of Division 1 of the Interstate Commerce Commission dated August 29, 1959, to be unlawful, until appropriate authority therefor is obtained. This Court will grant plaintiffs the relief they seek.

Opinion Rendered this 24 day of April, 1963.

John R. Brown, United States Circuit Judge; Joe Ingraham, United States District Judge; Ben H. Rice, Jr., United States District Judge.

[fol. 396] [File endorsement omitted.]

[fol. 397]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON
d/b/a E. & R. SHANNON

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION et al.

JUDGMENT—May 1, 1963

On the 22nd day of September, 1961, in the above entitled and numbered cause came the plaintiffs, defendants, and intervenors, and submitted all matters in controversy to a statutory Three-Judge Court, consisting of Honorable John R. Brown, Judge of the United States Court of Appeals for the Fifth Circuit; Honorable Joe M. Ingraham, Judge of the United States District Court for the Southern District of Texas; and Honorable Ben H. Rice, Jr., Judge of the United States District Court for the Western District of Texas, and the Court having considered the evidence in this cause and the written and oral argument of counsel, finds that plaintiffs are in a general mercantile business buying and selling many items, including sugar, and that there is not substantial evidence in the record upon which to base the Interstate Commerce Commission's findings and conclusions that plaintiffs have been and are engaging in transportation in interstate commerce of sugar as a common or contract carrier by motor vehicle without appropriate authority in violation of Sections 206(a) or 209(a) of the Interstate Commerce Act and that said Interstate Commerce Commission in so finding and concluding arbitrarily

exceeded its legal authority and that consequently the plaintiffs are entitled to the relief for which they pray, and it is, therefore, Ordered, Adjudged and Decreed by this Court [fol. 398] that the Interstate Commerce Commission and the United States of America be and they are hereby permanently enjoined from enforcing the terms of the order of the Interstate Commerce Commission dated April 5, 1960, which required and requires plaintiffs, Emma Shannon and Richard J. Shannon, d/b/a E. & R. Shannon, to cease and desist on or before May 23, 1960, and thereafter to refrain and abstain jointly and severally from all operations in interstate or foreign commerce, found by Division 1 of the Interstate Commerce Commission by report dated August 29, 1959, to be unlawful.

It is further ordered that copies of this order be delivered by the Clerk of this Court to all parties, and that none of the costs herein be taxed against plaintiffs.

Signed and ordered entered this the 1st day of May, 1963.

John R. Brown, United States Circuit Judge; Joe M. Ingraham, United States District Judge; Ben H. Rice, Jr., United States District Judge.

Entered: Civil Order Book Vol. #10, Page 961.

[fol. 399] [File endorsement omitted]

[fol. 400]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON,
d/b/a E. and R. SHANNON, Plaintiffs,

v.

U[illegible]TED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Defendants,

and

RED BALL MOTOR FREIGHT, INC., et al.,
Intervening Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 27, 1963

I.

Notice is hereby given that Red Ball Motor Freight, Inc., and the other intervening defendants identified in Appendix A attached hereto, hereby appeal to the Supreme Court of the United States from the final judgment entered in the action on May 1, 1963.

II.

The clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint, filed May 25, 1960, including Exhibits A, B and C attached thereto.

[fol. 401] 2. Joint answer of the United States of America and the Interstate Commerce Commission, served July 19, 1960.

3. Motion of Red Ball Motor Freight, Inc., et al., for leave to intervene as defendants, served July 25, 1960, including their proposed answer.

4. Motion of Brown Express, Inc., et al., for leave to intervene as defendants, served August 11, 1960, including their proposed answer.

5. Order allowing intervention as defendants, entered August 20, 1960.

6. Motion of certain railroads for leave to intervene as defendants, filed November 28, 1960, including their proposed answer.

7. Order allowing intervention as defendants, entered November 28, 1960.

8. Amendment to complaint, filed September 22, 1961.

9. Record of proceeding before the Interstate Commerce Commission, certified July 25, 1960, including:

a. Order of the Commission, entered November 5, 1956.

b. Order of the Commission, entered February 12, 1957.

c. Transcript of the stenographer's notes of hearing held March 29, 1957, at San Antonio, Texas, and Exhibits 1, 2, and 3, filed at said hearing.

d. Report and order recommended by R. O. Mittelbronn, Hearing Examiner, served August 29, 1957.

e. Report and order of the Commission, filed and entered August 3, 1959.

f. Petition for Reconsideration, filed September 8, 1959.

[fol. 402] g. Notice of the Commission, dated September 17, 1959.

h. Reply of Bureau of Inquiry and Compliance, filed September 25, 1959.

i. Order of the Commission, entered April 5, 1960.

j. Order of the Commission, entered June 1, 1960.

10. Stipulation of Facts entered into between plaintiff and intervening defendants, Brown Express, Inc., et al.

11. Brief of defendants, Brown Express, Inc., et al.

12. Transcript of oral argument before this Honorable Court.

13. Opinion, rendered April 24, 1963.

14. Judgment, entered May 1, 1963.

15. This notice of appeal.

III.

The following question is presented by this appeal:

Whether the District Court erred in setting aside the Commission's finding that the appellees' transportation of sugar was unauthorized for-hire transportation, rather than bona fide private carriage "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the appellees, within the meaning of Section 203(c) of the Interstate Commerce Act, where the appellees' "purchase" and transportation of sugar was largely related to the availability of unused capacity on the return movement of their trucks utilized outbound in bona fide private [fol. 403] carriage of other commodities, and where the sugar was usually delivered to the ultimate consumers without warehousing.

Phillip Robinson, 401 Perry-Brooks Building, Austin 1, Texas;

Charles D. Mathews, P.O. Box 858, Austin 65, Texas;

Amos M. Mathews, James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois;

Bond Davis, 2100 National Bank of Commerce Building, San Antonio 5, Texas;

Roland Rice, John C. Bradley, 618 Perpetual Building, Washington 4, D. C.,

Attorneys for Intervening Defendants.

[fol. 404] Proof of Service

I, Roland Rice, one of the attorneys for Red Ball Motor Freight, Inc., and the other intervening defendants identified on Appendix A attached hereto, hereby certify that on the 27th day of June, 1963, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties as follows:

(1) On the United States, by mailing copies, properly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to William H. Orrick, Jr., Assistant Attorney General, Department of Justice, Washington 25, D. C.; to John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; and, airmail postage prepaid, to Ernest Morgan, United States Attorney, San Antonio, Texas.

(2) On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, its General Counsel, and by delivering a copy to Fritz R. Kahn, Associate General Counsel, at their offices in Washington, D. C.

(3) On the plaintiffs, Emma Shannon and Richard J. Shannon, d/b/a E. and R. Shannon, by mailing copies in properly addressed envelopes with first class or airmail postage prepaid as appropriate, to their attorney, Walter C. Wolff, Jr., 417 South Main Avenue, San Antonio, Texas.

(4) On Jefferson D. Giller and Richard L. McGraw, 8th Floor, Bank of the Southwest Building, Houston 2, Texas, [fol. 405] by mailing copies in properly addressed envelopes, airmail postage prepaid.

Roland Rice, 618 Perpetual Building, Washington 4, D. C.

[fol. 406] APPENDIX A

The following intervening defendants do hereby participate in this Notice of Appeal:

(1) Red Ball Motor Freight, Inc.

(2) Brown Express, Inc.

(3) Texas-Arizona Motor Freight, Inc.

(4) Central Freight Lines, Inc.

(5) The Atchison, Topeka and Santa Fe Railway Company

(6) Chicago and North Western Railway Company

(7) Chicago, Burlington & Quincy Railroad Company

(8) Chicago Great Western Railway Company

(9) Chicago, Milwaukee, St, Paul and Pacific Railroad Company.

(10) Chicago, Rock Island and Pacific Railroad Company

(11) Great Northern Railway Company

(12) Illinois Central Railroad Company

(13) The Kansas City Southern Railway Company

(14) St. Louis-San Francisco Railway Company

(15) Soo Line Railroad Company

(16) Union Pacific Railroad Company

(17) Wabash Railroad Company

(18) The Western Pacific Railroad Company

(19) Texas Tank Truck Carriers Association, Inc.

(20) Regular Common Carrier Conference of American Trucking Association, Inc.

[fol. 407] [File endorsement omitted]

[fol. 408]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Civil Action No. 2840

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. Shannon, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

RED BALL MOTOR FREIGHT, INC., et al., Intervening Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 1, 1963

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on May 1, 1963.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2101(b).

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint, filed May 25, 1960, including Exhibits A, B and C attached thereto.

[fol. 409] 2. Order designating a Three-Judge Court, entered May 30, 1960.

3. Joint Answer of the United States of America and the Interstate Commerce Commission, filed July 21, 1960.

4. Motion of Red Ball Motor Freight, Inc., et al., for leave to intervene as defendants, filed July 26, 1960, including their proposed answer.

5. Motion of Brown Express, Inc., et al., for leave to intervene as defendants, filed August 12, 1960, including their proposed answer.

6. Opposition to Motion of Red Ball Motor Freight, Inc., et al., filed August 15, 1960.

7. Opposition to Motion of Brown Express, Inc., et al., filed August 19, 1960.

8. Order allowing intervention as defendants, signed August 20, 1960, and entered August 24, 1960.

9. Motion of certain railroads for leave to intervene as defendants, filed November 28, 1960, including their proposed answer.

10. Order allowing intervention as defendants, signed November 28, 1960, and entered November 29, 1960.

11. Order substituting Judge Joe M. Ingraham for Judge Allen B. Hannay, entered July 31, 1961.

12. Plaintiff's trial amendment, filed September 22, 1961.

13. Record of proceeding before the Interstate Commerce Commission, certified July 25, 1960, including:

a. Order of the Commission, entered November 5, 1956.

b. Order of the Commission, entered February 12, 1957.

[fol. 410] c. Transcript of the stenographer's notes of hearing held March 29, 1957, at San Antonio, Texas, and Exhibits 1, 2, and 3, filed at said hearing.

d. Report and order recommended by R. J. Mittlebrown, Hearing Examiner, served August 29, 1957.

e. Report and order of the Commission, filed and entered August 3, 1959.

f. Petition for Reconsideration, filed September 8, 1959.

g. Notice of the Commission, dated September 17, 1959.

h. Reply of Bureau of Inquiry and Compliance, filed September 25, 1959.

i. Order of the Commission, entered April 5, 1960.

j. Order of the Commission, entered June 1, 1960.

14. Opinion, rendered April 24, 1963.

15. Judgment, entered May 1, 1963.

16. This notice of appeal.

III.

The following question is presented by this appeal: Whether the District Court applied the wrong standard for determining, under section 203(c) of the Interstate Commerce Act, whether motor transportation is "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the carrier and thus is private rather than for-hire transportation.

William H. Orrick, Jr., Assistant Attorney General;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Ernest Morgan, United States Attorney, San Antonio 6, Texas,

Attorneys for the United States of America.

[fol. 411] Robert W. Ginnane, General Counsel;

Fritz R. Kahn, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.,

Attorneys for the Interstate Commerce Commission.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 412] [File endorsement omitted]

[fol. 418] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 420]

SUPREME COURT OF THE UNITED STATES

No. 406 & 421, October Term, 1963

RED BALL MOTOR FREIGHT, INC., et al., Appellants,

vs.

EMMA SHANNON, et al., etc.; and

UNITED STATES and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

EMMA SHANNON, et al., etc.

ORDER NOTING PROBABLE JURISDICTION—November 12, 1963

Appeals from the United States District Court for the Western District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.